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AMERICAN LAW AND PROCEDURE

VOLUME IV.

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PERSONAL PROPERTY AND BAILMENTS

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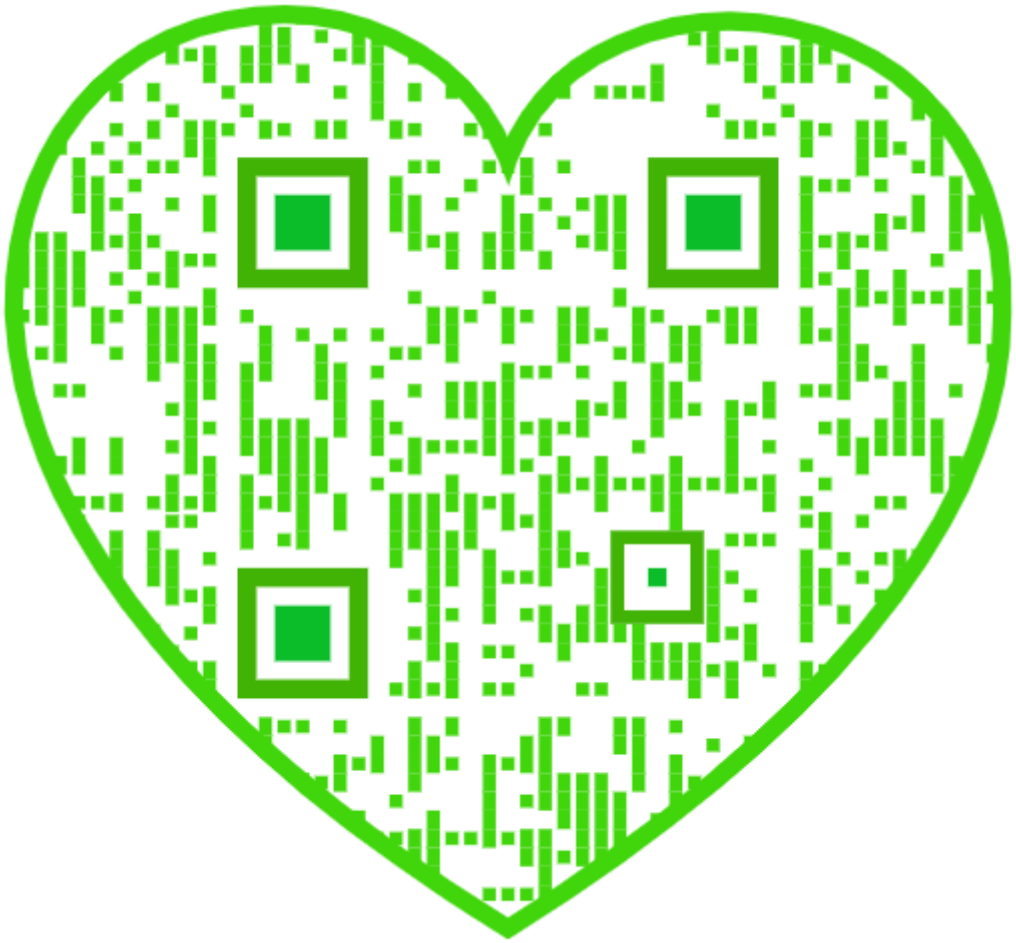

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PERSONAL PROPERTY AND BAILMENTS

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CHAPTER I.

NATURE OF PROPERTY RIGHTS.—CLASSIFICATION OF PERSONAL PROPERTY.

§ 1. **Property rights in rem and in personam.** The word property is used loosely and with several meanings. For our present purposes we may say that the right of property in a thing is the legal right to exercise dominion or control over it. Rights are divided into those available

against the whole world, known as rights *in rem,* and those available against one or more particular individuals, known as rights *in personam.* Rights *in rem* are the rights that the owner of land or goods has in them and with which no one may lawfully interfere, and, hence, are said to be rights against all men. Rights *in personam* are those rights that one or more individuals have against one or more other individuals and which exist against him or them alone, e. g., a right of action to recover a sum of money for failure to pay a debt or because of a wrong done.

In the sense in which we have used the word property we may say that rights *in rem* are property rights.

The violation of a right in rem may create a right in personam. Thus, if A is owner of land his right therein is a right in rem. If B trespasses on the land he has infringed A's right in rem and A now has a right in personam against B, namely to bring an action against B and recover from him damages for the wrong done.

A right may be, in one aspect of it, a right in personam and, at the same time, a right in rem. Thus, in the case put, A's right in personam against B is itself with respect to all other persons a right in rem. It is property and, as such, a right that A holds against the whole world and with which no one may interfere.

Property rights may exist, then, over actual things perceptible to the senses, such as land, cattle, and goods, and, also, over other rights, mere abstractions of the law.

In either case the property right is a right in rem and, applying the word property to the object with respect to

which the property right exists, in the former case we say it is corporeal property and in the latter incorporeal property.

§ 2. **Distinction between real and personal property.** Property is classified as movable and immovable and as corporeal and incorporeal. The latter classification is recognized by our law and the distinction has some important effects, but with it we are not now concerned. The former, into movable and immovable, is a natural classification, but our law has adopted in place of it the division of property into personal and real, in the main corresponding, respectively, with movable and immovable, but with exceptions.

§ 3. **Real property.** Real property, broadly speaking, is all interests in land, except terms of years. The name is derived from the Latin name applied in early times to the action brought to recover land, *actio realis,* which means simply real action. It was given to that kind of an action because in that action the land itself was recovered, and not merely a money equivalent for the land. Then the word "real," taken from the name of the action, was applied to the kind of property recovered in such an action. As real actions were brought for land only, real property became the name of property interests in land, with the exception of terms of years.

§ 4. **Personal property.** When an action was brought to recover a movable article, such as cattle or goods, i. e., something that was not land, the defendant could absolve himself by paying the value in money of the thing sued for, i. e., damages. Consequently, the action was in effect against a person and not against a thing and was

classed with those actions brought to recover damages for a wrong or the breach of a contract and was known as an *actio personalis,* or personal action, and the name "personal" was given to the kind of property concerning which the action was brought.

Personal property, then, includes all property that is not real. Anything that is the subject of property and not land or a right in land is, in our law, personal property, and, in addition thereto, one kind of interest in land, namely a term of years, is personal property.

§ 5. **Term of years.** A term of years is the interest in land of a tenant for a certain number of years or portion thereof, the word "term" referring to both the period and the interest itself. Formerly, if the tenant was turned out of possession by either the landlord or a third person, he had no remedy by which he could recover possession of the land itself, but only an action for damages against the landlord on the covenant contained in the deed of lease. This was a personal action, and, on the death of the tenant within the term, the benefit of the covenant devolved upon the tenant's personal representatives who were entitled to his personal property. Later, a new action was introduced that gave the tenant a remedy by which he could recover possession of the land itself. Thus his interest became a property right in the land; but this new interest, naturally enough, passed, on the tenant's death, not to his heirs who took his real property but, as did before the rights under the landlord's covenant, to his personal representatives and so came to be classed as personal property instead of real property, although it is an interest in land.

§ 6. **Devolution of property at death of owner.** This is the best test of whether it is real or personal. Real property passes directly to the owner's heirs, while the title to personal property goes to his personal representatives, i. e., his executor or administrator. Things thus passing to heirs or inherited are termed hereditaments. They are treated under the head of real property and are properly real property, being land or interests in land with the exceptions mentioned below.

§ 7. **Special forms of property.** The English law recognizes certain inheritable property rights known as incorporeal hereditaments. With the exception of annuities these hereditaments are either not recognized as property in the United States, or are rights in land. Annuities, when made inheritable by the heirs of the annuitant, seem to be personal property and a true exception to the statement that hereditaments are real property. They are rare. Some articles, personal in their nature, go to the heir under the name of heirlooms, as deer in a deer park, pigeons in a pigeon house, old family pictures, and the like.

A mortgagee's interest in a mortgage before foreclosure is personal property. So, also, is stock in a corporation, although the corporation owns real estate.

There is a class of personal property articles that are attached to the land and are known as fixtures, but while attached they are properly part of the land and are dealt with in the article on Landlord and Tenant, Chapter VI, elsewhere in this volume.

§ 8. **Personal property: Chattels.** The name "chattel" is sometimes applied to all personal property. Its derivation is obscure, and in its largest sense it can be best described, like the words "personal property," as signifying any species of property that is not real property. Its meaning is more commonly confined to things movable, corporeal in their nature, such as animals, household goods, money, clothing, grain, machinery, or any article that can be handled and transported, in distinction from incorporeal rights. These are also called "chattels personal."

"Chattels real" are terms of years, which have been considered above. As being personal property they are classed as chattels; as being interests in land they are denominated chattels *real*. It is immaterial with respect to their character as personalty how long the term may be, if of a determined length. Though it is for a thousand years it is a chattel interest, unless declared by a statute to be realty.

§ 9. **Same: Choses in action.** Choses in action, or things or rights in action, are personal rights to recover property or money by action. Thus a promissory note, or a bond, or a right of action for a tort are choses in action. They are distinguished from choses in possession which are chattels reduced to actual possession. This division between things in possession and not in possession is another recognized classification of personal property.

CHAPTER II.

REMEDIES FOR INFRINGEMENT OF RIGHTS IN PERSONAL PROPERTY.

SECTION 1. RECOVERY OF SPECIFIC PERSONAL PROPERTY.

§ 10. **Detinue.** This is an action primarily for the recovery of specific personal property alleged to belong to the plaintiff, and, if the property is not found, then for damages for its value, and in either case, for damages for the detention. The option of giving up the goods or paying the value is in the defendant (1). Consequently the action is not so effective to secure the specific property as is replevin, and detinue is seldom brought in the United States.

§ 11. **Replevin.** This is the common action in the United States to recover specific personal property. In England the action lies only when the property was wrongfully taken from the possession of the plaintiff (2). Consequently there the plaintiff's only remedy is often detinue. In the United States replevin lies for the wrongful detention of personal property, whatever the nature of the original taking. Thus, where the defendant contracted to carry flour for the plaintiff and it was placed on board the defendant's ship, he afterwards refused to

(1) Phillips v. Jones, 15 Q. B. 859.

(2) Mennie v. Blake, 6 E. & B. 842.

proceed because of a blockade without a guarantee from the plaintiff which the latter was not obliged to give. The plaintiff demanded the return of the flour, which the defendant refused. It was held that the plaintiff might maintain replevin for the flour (3). If the original taking was lawful a demand by plaintiff is necessary to make the detention unlawful and to lay a foundation for the action. Damages for the detention may also be recovered in the action.

The property is taken from the defendant on a writ of replevin and delivered to the plaintiff at the beginning of the action upon the plaintiff's giving security that he will prosecute the action, and, if not successful, return the property with damages. Replevin is therefore a much surer remedy to recover the property itself than detinue, and as it lies in the United States wherever detinue could be brought it has in this country practically superseded detinue.

§ 12. **Bill in equity.** This is sometimes allowed where there is no adequate remedy at law for the recovery of property. In the English case of Somerset v. Cookson (4) the plaintiff was the owner of an old altar-piece of silver, remarkable for a Greek inscription and dedication to Hercules. It had come into the possession of the defendant, a goldsmith, and the plaintiff brought a bill in equity to compel the delivery of the specific property undefaced. The defendant having demurred that the plaintiff had his remedy at law, the demurrer was overruled.

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(3) Stoughton v. Rappalo, 3 S. & R. 559; and see Dame v. Dame, 43 N. H. 37, for a discussion of detinue and replevin.

(4) 3 P. Wms. 390.

It seems that under the English practice replevin would not lie; detinue would not insure the return of the property and, under the peculiar circumstances, damages for the value of the property were not an adequate remedy. In the United States replevin could have been brought and probably the bill in equity would not have been allowed. The question when an equitable remedy will be allowed because of the inadequacy of the legal remedy is discussed in the article on Equity in Volume VI of this work.

Section 2. Action for Damages.

We have spoken thus far of actions to recover specific personal property. When the plaintiff does not seek to recover the specific property but its value, he brings an action for damages.

§ 13. **Trover.** This is the common law action for the conversion of personal property. It may be brought when the defendant has wrongfully taken or retained goods of which the plaintiff had possession or the right to possession. The general rule is that the plaintiff recovers as damages the value of the property. For a discussion of conversion see the article on Torts, Chapter IV, in Volume II of this work.

§ 14. **Trespass.** This action lies for taking personal property from the possession of the plaintiff, or for injuring it while in his possession. This is also discussed in the article on Torts, Chapters II and III.

§ 15. **Case.** This form of action may be maintained by one in possession of property for a consequential injury resulting from the failure of the defendant to perform a

duty imposed upon him. It is also the proper remedy for an injury to the plaintiff's reversionary interest in property in the temporary possession of another. See the article on Pleading, § § 35-39, in Volume XI of this work.

§ 16. All personal property actions are possessory only. As any of the actions mentioned above, both those for the recovery of the specific property and those for damages, may be maintained by a plaintiff whose only interest in the property is a right of possession, it will be seen that they try only the plaintiff's right of possession and are so-called possessory actions. Of course when the right of possession depends upon title, a determination of the right of possession determines the title, but there is no action that directly tries title to personal property.

CHAPTER III.

TITLE TO PERSONAL PROPERTY BY OCCUPANCY.

§ 17. Chattels having no former owner: Newly created property. Property newly created belongs to the one bringing it into existence. It seems that the only instances of this are the exclusive rights in literary works and inventions. If published to the world the exclusive property in them was lost at common law. The statutory provisions for preserving this property right are treated in the article on Patents and Copyright elsewhere in this volume.

§ 18. Same: Wild animals. The ownership of wild animals, so far as any title to them when running at large exists, is in the state, to be exerted and exercised for the common good, as by the passage of game laws (1). Private property in them can be acquired only by reducing them to possession. No property in them attaches until possession is actually acquired. Where the plaintiff had drawn a net partially around some fish and was splashing the water to keep them from escaping through the opening and the defendant interfered so that the plaintiff lost the fish, it was held that the plaintiff had no cause of action for the loss of the fish, the court saying: "It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant,

(1) Geer v. Connecticut, 161 U. S. 519.

but it is quite certain that he had not possession" (2). In Butler v. Newkirk (3), the plaintiff had wounded a deer which ran six miles after being wounded, and the plaintiff gave up the chase for the night but resumed it in the morning. In the meantime the defendant had killed the deer the evening before. On the plaintiff bringing trover for the skin it was held for the defendant. The deer had not been deprived of his natural liberty so as to be in the power or under control of the plaintiff. It would seem that if the plaintiff could have shown that the deer had been fatally wounded and could have been tracked, the plaintiff would have been entitled to it, as then the deer would have been, in effect, under plaintiff's control. By a custom prevailing among whalemen and recognized as binding, the ship which first fixes a harpoon in the whale is entitled to it though it is afterwards killed by another ship's crew, if the first ship claims the whale before "cutting in" (4).

As title to property created merely by the act of reducing a thing into possession necessarily implies a reduction into possession by a lawful act, where a trespasser kills animals on another's land without the latter's permission the dead animals are the property of the owner of the land (5).

§ 19. **Lost or abandoned chattels: Wreck.** Wreck means shipwrecked property that has been cast upon the shore, and it formerly belonged to the king if the owner

(2) Young v. Hichens, 6 Q. B. 606.
(3) 20 Johns. (N. Y.) 75.
(4) Swift v. Gifford, 2 Lowell 110.
(5) Blades v. Higgs, 11 H. L. C. 621.

was not known. A vessel sunk at sea is not wreck (6). It was provided by statute, 3 Edw. I. c. 4, that if a man, dog, or cat escaped alive from the wreck (this being a means of indentification) and the goods were claimed within a year and a day, the owner should not lose them; but it was held in Hamilton v. Davis (7) that the goods were not lost to the owner if he could identify them, even if nothing came alive from the wreck. This right of the crown has probably passed to the American states if they choose to exercise it. The several states bordering on the sea have enacted laws providing for the safe-keeping and disposition of property wrecked on the coast. In the absence of statutory provisions the owner would not lose his property, provided he can identify it and appears within a year and a day to claim it, which time runs from the day the goods are actually taken by the finder. (8). Subject to the rights of the owner and the claims of the state, it seems the finder would be entitled to retain the goods by virtue of the right of possession, if not a trespasser (9).

§ 20. **Same: Waifs and estrays.** Waifs were goods stolen and thrown away or waived by the thief in his flight. Under certain circumstances they were given to the king by the common law if seized for his use (10). The doctrine has never been adopted in the United States.

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(6) Baker v. Hoag, 7 N. Y. 555.

(7) 5 Burr. 2732.

(8) Murphy v. Dunham, 38 Fed. Rep. 503. It seems doubtful whether the limit of a year and a day would now be enforced.

(9) See Barker v. Bates, 30 Mass. 255.

(10) 1 Bl. Com. 297.

The true owner does not lose title so long as he can identify his property

Estrays are wandering domestic animals of value whose owner is unknown. The common law gave them to the king and they most commonly came to belong to the lord of the manor by special grant from the crown (10).

In probably all of the United States there are statutes providing for the care and disposition of estrays, the usual practice being to dispose of them for the public benefit if the owner does not claim them.

§ 21. **Same: Treasure trove.** This is valuable property, such as money, bullion, gold and silver plate, and works of art found hidden in the earth and of which the owner is not known. The English common law gave them to the king (11). In many of the United States the legislature has vested treasure trove in the state. Although the states may be deemed to have succeeded to the rights of the crown, those rights would scarcely be enforced in the absence of statutory provisions on the subject. The original owner would always be entitled to his property if he appears and claims it, unless barred by a statute of limitations. Subject to his rights and the rights of the state the question would be as to the finder's right of possession. It will be convenient to treat later of this question under the general head of "Finding," §§ 81-90, below.

§ 22. **Same: In general.** Lost and abandoned chattels other than those specially treated above were by

(10) 1 Bl. Com. 297.

(11) 1 Bl. Com. 295.

the common law given to the finder, subject to the claims of the original owner (12). This matter also will be treated later under "Finding." In some of the states it is a subject of regulation by statutes, which provide for the care and disposition of found property.

(12) 1 Bl. Com. 296.

CHAPTER IV.

TITLE BY ACCESSION.

§ 23. **Definition of accession.** Accession is the addition to the value of one's property of the labor or material of another. The word is also used in the sense of the right to such addition (1).

§ 24. **Who is entitled to accession?** When is one entitled to the accession to his property, or, in other words, when is he entitled to his property with the accession to it? The question arises when A has made accession of labor or material to the property of B. The answer to the question depends on whether title to the property has passed to A as a result of the accession. When A has made such accession in pursuance of an agreement with B to improve B's property for him, of course B retains title to the property as increased in value. Thus, if B takes his own materials to a tailor and employs the latter to make them into a suit of clothes, B owns the suit. When, however, A has converted (2) B's property and,

(1) Chancellor Kent defined accession as the right to all which one's own property produces, whether that property be moveable or immoveable, and the right to that which is united to it by accession, either naturally or artificially. 2 Kent Com. 360. This broader meaning includes the natural increase of property, e. g., of animals. The definition in the text, however, is more appropriate to the questions of law to be considered in this chapter.

(2) On what constitutes a conversion, see the article on Torts, Chapter IV, in Volume II of this work.

without his consent, made accession to it, there may be a question whether the title has passed to A. If not, B still owns the whole. If the title has passed, it is no longer B's property, and he can recover only the value of the property originally converted.

§ 25. **The test of identity.** This was the one first adopted by the courts, the general principle being laid down that if one's property is converted and added to in value, but its identity is not changed, the original owner is entitled to it in its improved form. Thus where leather belonging to defendant was converted by the plaintiff who made it into slippers and shoes and boots, and the defendant took them, it was held that he might, for he had not lost his property for its identity had not been lost. The court said that when one makes malt of another's grain, or pennies are made from metal, the former owner's title is lost for there the identity is gone. So, if A's timber is built into B's house it belongs to B because it has become real property (3).

This rule is still often stated as the law. In Silsbury v. McCoon (4) the plaintiffs made grain not belonging to them, but then in their distillery, into whiskey. Later the whiskey was sold on execution against the owner of the grain and purchased by the defendant who converted it to his own use. In trover by the plaintiffs it was held that the plaintiffs had acquired title to the whiskey by manufacturing it because "the nature and species of the commodity was entirely changed and its identity destroyed."

(3) Anon., Y. B. 5 Hen. VII, 15 pl. 6.

(4) 6 Hill 425.

When we come to examine what is meant by a change of identity the unsatisfactory nature of this test becomes apparent, and there is great confusion in the books on the subject. Sometimes it is said (5) that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection, and, sometimes, that when the thing is so changed that it cannot be reduced from its new form to its former state by "individual operation" its identity is gone (6). In one case it was held that the owner of trees made into timber might reclaim the timber "because the greater part of the substance remains" (7).

These different rules cannot be reconciled or satisfactorily applied to the various examples put, as, grain made into malt, wheat into bread, and milk into cheese, in which cases the identity is said to be changed; and cloth made into a coat, leather into shoes, a tree into squared timber, and iron into a tool, in which it is said there is no change of identity (8). There is, in truth, no definite rule as to what constitutes a sufficient change of identity to cause a loss of title, and the cases adopting this test are in hopeless confusion; nor does there seem to be any foundation of justice in the distinctions attempted to be made.

§ 26. **The test of increased value.** This is the natural

(5) 5 Hen. VII, 15 pl. 6, supra.

(6) Lampton's exrs. v. Preston's exrs., 1 J. J. Marsh. 454, where brick made from another's clay that were burnt were held to be changed, but unburnt brick were not.

(7) Moore 19, pl. 67.

(8) And compare the decision and examples put in the anonymous case above.

and just one and is that which the modern cases are fast adopting, although the old phraseology about the change in identity is not wholly discarded. Though the courts speak of change of identity in many cases in which the decision is in fact based on the change in value, these are really instances of the conservatism of legal terms. The courts mean that change of identity is a matter of change of value. No other ground will explain the cases or is logical. It may be accepted that the modern doctrine of accession is based upon the extent to which there has been a change in value. If the convertor has added enough value to the property he has acquired title. On this point a distinction is to be made between a mistaken and innocent conversion and a fraudulent or wrongful conversion.

§ 27. **Innocent conversion.** In Weymouth v. The Chicago and N. W. R'y Co. (9) the defendant by mistake and without wrongful intent converted the plaintiff's wood, then being at Farmington, where it was worth $1.50 per cord, and took it to Janesville where it was worth at first $4 and later $5 per cord. The plaintiff demanded the wood at Janesville and defendant did not deliver it. In an action for the conversion it was held that the value of the wood at Farmington should be allowed as the measure of damages. As in trover the plaintiff is entitled to recover the value of his property when converted, the decision must mean that the increase in the value of the wood resulting from its transportation, caused the title in it to pass to the defend-

(9) 17 Wis. 550.

ant, so that the plaintiff could not treat it as having been converted at Janesville. The identity was unchanged, so that by the old rule the title should have remained in plaintiff (10). In Single v. Schneider (11) the defendants cut logs from plaintiff's land by mistake and sawed and rafted them. It was held that the damages should have been the full value of the property, deducting the expense put upon it by defendant down to the time of beginning the action, i. e., the plaintiff was not entitled to the accession. In Wetherbee v. Green (12) defendant had in good faith, believing it to be his own, cut from plaintiff's land timber, worth when cut $25, and manufactured it into barrel hoops worth near $700. In replevin for the hoops, the court said: "The important question appears to us to be whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities;....when the right to the improved article is the point in issue, the question how much the property or labor of each has contributed to make it what it is, must always be one of first importance.... No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative

(10) There is much confusion in the cases on the question of the measure of damages in trover, and the point made in the text, that the proper ground of the decision is the change of title when the property was first taken, is not always taken. See the article on Damages in Volume X of this work, for further discussion.

(11) 24 Wis. 299.

(12) 22 Mich. 311.

values." And it was held that if the defendant had acted in good faith the title to the timber was changed by a substantial change of identity. The decision seems to rest upon the amount of change in value, although it is spoken of as a change in identity.

The rule to be deduced from the foregoing cases is that when there has been a conversion through innocent mistake and the convertor has added largely to the value of the property, he acquires title to it. The cases have not established any more definite test of the amount of accession necessary than that it shall be large enough so that it would be unjust to hold that the convertor shall lose his labor or material. If the action is replevin for the improved property, this is the only rule to be applied. If it is trover for the value of the property the equities can be more easily adjusted by allowing the plaintiff to recover only the original value of his property whatever the amount of the accession. Yet, strictly, perhaps, the only theory upon which that can be done is to treat the title as having passed to the convertor at the time of the first taking.

In Isle Royal Mining Co. v. Hertin (13) the plaintiffs through mistake and in good faith cut cordwood on the land of defendant and carried it away and piled it. The defendant took the wood. The value of the wood when the defendant took it was $2.87½ per cord and the value of the labor expended upon it by plaintiffs was $1.87½ per cord. Plaintiffs brought trover and indebitatus assumpsit, claiming to be remunerated for their labor. The

(13) 37 Mich. 332.

case was professedly decided on principles applicable to the law of accession, in favor of the defendant, the court saying: "Where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. . . . . There is no such disparity in value between the standing trees and the cordwood in this case as was found to exist between the trees and the hoops in Wetherbee v. Green" (14).

§ 28. **Wilful conversion.** When the convertor has wilfully and without right taken another's property and made a small increase in the value, it follows a fortiori from the foregoing doctrines that the original owner does not lose title but may recover the property or its value with the increase. When, however, there has been a great change in value the question is more difficult. The general view, sustained by the weight of authority, is that a wilfully wrongful convertor cannot acquire title by accession however much value he may have added. In Silsbury v. McCoon (15) where A made grain, knowing it not to belong to him, into whiskey, it was held that the owner of the grain owned the whiskey, and the court expressly held this to be so without reference to the degree of improvement or the additional value

(14) See note (12), above.

(15) 3 Comst. (N. Y.) 379. A second trial of the case cited above.

given to it by the labor of the wrongdoer. In Woodenware Co. v. United States (16) thieves cut timber from government land where its value at the time it first became a chattel by cutting was $60.71 and carried it to Depere, where its value was $850, and there sold it to the defendant (plaintiff in error) who bought in good faith. It was held that the thieves could acquire no title by accession and, having no title, could convey none to defendant, and the government was allowed to recover the value of the timber at Depere. If the defendant had later added value, he would have acquired title by accession and been liable for the value only at the time of the first conversion by him, i. e., when he bought.

While the foregoing represents the weight of authority, there is some recognition of the doctrine that a wilful convertor may acquire title if he adds so much value that the loss of the accession would be too great a penalty to impose upon him for the conversion. In Single v. Schneider (17) defendants cut logs from the land of the plaintiff, part in good faith and part intentionally. The question being the amount of damages to be recovered, it was held that it made no difference whether defendant made a mistaken or intentional conversion; plaintiff was entitled to only the original value of the property before the accession. The logic of the reasoning should lead to the same result if the action were replevin to recover the specific property, for the denial of the right of the plaintiff to recover the enhanced value of

(16) 106 U. S. 432.
(17) 30 Wis. 570.

the property in an action of trover must rest upon the ground that the title has passed to the convertor as a result of the accession; and the property right should not be dependent upon the plaintiff's choice of remedy.

CHAPTER V.

TITLE BY CONFUSION.

Section 1. Lawful or Accidental Confusion.

§ 29. **Definition of confusion.** Confusion is such a mixture of the goods of two or more persons that they cannot be distinguished. It includes mixtures of similar goods, as of two quantities of the same kind of grain or liquid, and also of different kinds, where the result is a mass, the elements of which are indistinguishable, as of two kinds of liquids or metals melted and fused together, and where the original elements are practically inseparable, as wheat and oats thoroughly intermingled.

The doctrines of confusion and accession have some analogous features, but confusion is to be distinguished from accession, in that while accession is the addition in value made by one to the property of another, confusion is the mixture of the property of two or more persons. If A builds a house with B's bricks, it is the accession of B's bricks to A's land; if two piles of bricks, one belonging to A and one to B, are mixed together, it is confusion. Confusion often gives the different parties rights in common. In some cases of confusion they become owners in common of undivided shares in the mass. Accession never gives rights in common. One party or the other is the sole owner of the whole. In

cases of confusion the important question is, "Who has title to the mass?" If the property of A and of B are indistinguishably mixed, A or B may have title to the mass or each may own an undivided share in it.

§ 30. **General rule.** Where several different owners shipped cotton in a vessel which was wrecked and part of the cotton was lost and the marks on the remainder were obliterated, so that the cotton of the respective owners could not be distinguished it was held that the different owners became owners, or, as termed in law, tenants in common of the whole mass, each owning a share proportionate to his share of all the cotton shipped (1). So if A and B, by mutual agreement, mix their grain, they become tenants in common, with interests proportionate to their contributions. These cases represent the general rule.

§ 31. **Effect on title of bailment, sale or mutuum.** A bailment is the placing of personal property by one known as the bailor, in the possession of another, known as the bailee, who is to return the identical property to the bailor. The purpose may be to give the bailee the use of the property or to have something done with it or to use it for the bailor's benefit, e. g., to have it stored or to have some work done upon it.

In the case of a true bailment, the bailee does not acquire title. He has merely the right of possession to carry out the purposes of the bailment. If the identical property is not to be returned but something else in its stead, it is a sale or mutuum, being the latter when sim-

(1) Spence v. Union Marine Insurance Co., L. R. 3 C. P. 427.

ilar property is to be returned. If it is a sale or mutuum the title passes to the transferee of the property. Thus, where plaintiffs delivered wheat to a miller under an agreement by which the miller was to give the plaintiff a barrel of flour for each amount of wheat of an agreed quantity, it was held that the transaction was a sale (2). Where, however, wheat was furnished and flour was to be returned, and it was agreed that the flour was "to be made out of the wheat furnished by" the person furnishing it, it was a bailment (3). In the former case there was no such obligation to return the flour made from the identical wheat.

§ 32. **Confusion by bailee and vendee.** Cases of confusion frequently occur when a person, with whom property has been deposited, mixes it with the property of other persons or of himself. It becomes important to determine whether the transaction is a bailment or a sale. If it is the former, it is a case of confusion; if it is the latter, there is no real confusion. In Smith v. Clark, above, the wheat received from the plaintiff by the miller was stored by him in a common bin with other wheat. As the agreement made a sale, this was not a true case of confusion. The miller simply mingled his own property. When, however, a bailee mixes property of different owners deposited with him the result is a confusion. In Sexton v. Graham (4) grain was deposited with a warehouseman by different owners. The contract was that the grain was received in store subject

(2) Smith v. Clark, 21 Wend. (N. Y.) 83.
(3) Inglebright v. Hammond, 19 Ohio 337.
(4) 53 Ia. 181.

to the orders of the depositors and it gave the warehouseman the right to mix the grain. He did so, mixed in grain of his own, and then wrongfully sold more than the amount of his own grain. In an action to determine the rights of the respective owners in the grain that remained it was held that the contract was a bailment and that all the several owners, including the warehouseman himself, became tenants in common. When one owner's share was drawn out the part taken became appropriated to him, and the others continued to own the rest in common. When more was added the new owner became a tenant in common with the others, the rights of the former owners attaching to the new grain so added. The warehouseman's act in withdrawing more than his own share was a conversion as to the excess, but it left the others tenants in common of the residue. It is a peculiar bailment, for, by the agreement, the bailee may substitute, by means of successive withdrawals and additions different property for that bailed. Ordinarily the right to return other property would make a mutuum, but here it was a bailment with the right to mix, thus giving the bailee the right to substitute, but the bailor's title as bailor immediately attaching to the substituted property. The holding that the different depositors became tenants in common of the mass is an application of the general rule in lawful confusion.

In Nelson v. Brown (5) wheat was deposited with a warehouseman under a contract for storage, making loss by fire at the owner's risk and allowing wheat of equal test and value, but not the identical wheat, to be returned.

(5) 44 Ia. 455.

The warehouse was burned, and an action against the warehouseman for the value of the wheat was decided for the defendant. The right to return other wheat, if there were no other provision in the contract, would have made the transaction a sale and the risk would have been on the warehouseman from the time of the deposit; but the clause that the wheat was at owner's risk showed the intention was that title should not pass, and hence it was a bailment and the owner must bear the loss. It follows that whatever the general nature of the transaction, the title will not pass if there is anything showing an express agreement that it shall not pass.

The case, however, seems open to criticism on the point that the right to return other wheat, standing alone, would have made it a sale (or mutuum) from the time of deposit. As it was optional with the warehouseman to return other or the identical wheat, the contract really was a bailment until the warehouseman elected to make it a mutuum by returning other wheat or by putting it out of his power to return the identical wheat, as by selling or mixing it. So, in Ledyard v. Hibbard (6) the court said: "As by the receipt the grain was declared to be at the depositor's risk, for the time being, it must have continued to be at his risk until some act was afterwards done by one party or the other to convert what at first was manifestly a bailment into a sale;" thus recognizing that a deposit may constitute a bailment with a power in one party or both to make it a sale.

(6) 48 Mich. 421.

Section 2. Wilful Confusion.

§ 33. **General rule.** The law makes a distinction between lawful or accidental (innocent) confusion and wilful or tortious confusion. Where plaintiff had cut wood from his own land and from defendant's land and mixed it, and defendant took the whole, the trial court charged that if the wood was so mixed that the defendant could not distinguish which was his, his taking it was not a trespass. The charge was held to be erroneous because it took no account of the good or bad faith of the one responsible for the mixture (7). The good or bad faith in which the mixture is made has a material effect on the right of the respective owners.

The general principle usually stated to be the law is that where A tortiously mixes his property with that of B, so that it cannot be separated, title to the whole passes to B. Thus where the plaintiff, claiming title to certain hay belonging to the defendant, in order to be more sure to secure it, mixed it with hay of his own, and the defendant then carried away the whole, and the plaintiff brought trespass for that taking, it was held that the defendant was not liable. As the hay was indistinguishable the defendant had a right to the whole (8). And where one mortgaged a number of hats, and, being in possession, mixed them with hats of his own, so that the property of each became indistinguishable, and from the mixture sent hats to the defendant, the mort-

(7) Ryder v. Hathaway, 21 Pick. (Mass.) 298.

(8) Anon., Pop. 38, pl. 2.

gagee was allowed to recover in trover for all the hats received by the defendant (9).

§ 34. **No forfeiture where restitution possible.** The general principle, however, is carried no further than justice requires. In Hesseltine v. Stockwell (10) A had cut logs on his own land and on plaintiff's land, mixed them, and marked them the same. Part was sold to the defendant. The plaintiff seized of that part a portion equal to what was cut on his land. The defendant retook it, and the plaintiff brought trover. It was held that an instruction to the jury that the plaintiff must prove that the logs for which he claimed damages in this action had been cut on his land and that there was no question of confusion in the action was erroneous. If the logs were so mixed as to be indistinguishable, under the law of confusion the plaintiff would be entitled to a quantity equal to what came from his land, although the identical logs taken might not all have come from his land. On the point here considered the court said: "And there is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule and is fully sustained by authority. Lord Eldon, in the case of Tupton v. White, 15 Ves. 442, states the law of the old decided cases to be, 'if one man mixes his corn or flour with that of another and they are of equal value, the latter must have the given quantity;' . . . This doctrine is stated with approval by Kent. 2 Kent's Com. 365." The

(9) Willard v. Rice, 11 Metc. (Mass.) 493.

(10) 30 Me. 237.

case makes it clear that when a restitution to the injured party of an amount equivalent to what was taken from him is possible there is no forfeiture of the wrongdoer's share. The law is satisfied if a complete recompense is made.

§ 35. **Burden of separation on wrongdoer.** In Fuller v. Paige (11) the defendant was mortgagee of certain drugs and medicines. The mortgagor, being in possession, sold the goods to plaintiff who mixed with them some goods of his own, and, when requested by the defendant to pick out his own property, refused. The defendant then took all and the plaintiff brought trespass. It was held that defendant was not liable for taking all. And where plaintiff wilfully mingled his logs with defendants', which he had converted, so that they were indistinguishable, and the defendants took a quantity that they in good faith believed equivalent to their own so taken, having no means of ascertaining the exact amount; in trover by the plaintiff against the defendants for the surplus that it was claimed the defendants took, it was held that the defendants were not liable (12).

The burden rests upon the wrongdoer to make the separation if he wants his property. The injured party is only obliged to exercise good faith. If he has no means of knowing what is his he may take as much as he in good faith believes is necessary to recompense him.

§ 36. **Mixture of property of unequal values.** In the cases discussed thus far the mixture has been of goods

(11) 26 Ill. 358.

(12) Smith v. Morrill, 56 Me. 566.

of the same kind and equal value. Sometimes the goods mixed are of different qualities, producing a mixture differing in value from either of its constituent elements. In Jenkins v. Steanka (13) one Wright had cut lumber from the plaintiff's logs, and from his own, and mixed it. The lumber from the plaintiff's logs was much superior in quality to the other. In an action to recover possession of the lumber or its value, the trial court instructed the jury that "if they found for the plaintiff, he could only recover the amount of lumber which he had proved to have been wrongfully taken by Wright, although it may have been commingled with the lumber of Wright wrongfully." This was held to be error, the court saying: "The law, we think, is that if Wright wilfully or indiscriminately intermixed the lumber sawed from the logs of the plaintiff with his own lumber, so that it could not be distinguished, and the lumber so mixed was of different qualities or value, then the plaintiff would be entitled to hold the whole." Here, it is to be observed, the mixture was inferior in quality to the property taken.

If the mixture was of a quality superior to the innocent party's property, it seems that the latter should, on the same principle governing in cases of mixtures of goods of equal quality, be allowed to retake only his proportionate amount, if it is known.

§ 37. **Remedies.** Generally speaking, one may take that to the possession of which he is entitled, if he can

(13) 19 Wis. 126.

do it peaceably. So of the whole mass or of a part thereof, according to the rights in the case.

If the result of the confusion is to create a tenancy in common, each tenant is entitled to possession of the whole. Neither has a right to take the mass from the other. It is, of course, competent for them to make a voluntary division of the mass and thus appropriate a definite portion to each. If they cannot agree, on strict principle the only recourse is to a court of equity to have a partition decreed or to have the property sold and the proceeds divided.

Strictly the action of replevin does not lie by one tenant in common to recover a portion of a mass in an undivided share of which he is owner, because replevin is an action to recover specific property described in the writ. This principle is recognized by some courts, and therefore they do not allow replevin to recover an undivided share in a mass (14). When, however, the property is readily divisible by count or weight or measure, the property claimed by the plaintiff can be easily described in the writ, and the objection to allowing the action—that replevin is for specific property and should not be used to make partition between tenants in common—is purely technical and does not commend itself to common sense. Many courts, therefore, in such cases allow replevin to recover an undivided share, e. g., so many bushels of grain from a larger quantity (15).

Where an intentional convertor of logs from plaintiff's

(14) Low v. Martin, 18 Ill. 286; Read v. Middleton, 62 Ia. 317.

(15) Freese v. Arnold, 99 Mich. 13.

land mixed them with other logs and sold the whole to defendant, who bought in good faith, the plaintiff was allowed to replevy from the mass an amount equal to that converted from him and had the right of selecting the quantity due him (16). Here the confusion was wrongful and replevin would probably be generally allowed in such cases, as the plaintiff had been made a tenant in common against his will, and he is to be treated as such only so far as necessary. If the original taking constituted a conversion or trespass, the one from whom the property was so taken has an action of trover or trespass. If the conversion has created a tenancy in common and one owner is in possession of the mass, his refusal to allow the other co-tenant to take his share is not, on principle, a conversion; for, as each is entitled to possession, it is no conversion for the one in possession to refuse to give it up even as to a part. However, here, as in the case of replevin, the courts have tended to take a common-sense view of the situation, to waive the technical objection, and to allow trover by one co-tenant of a divisible mass against the other who has refused to permit the plaintiff to take his share (17).

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(16) Blodgett v. Seals, 78 Miss. 522.

(17) Stall v. Wilbur, 77 N. Y. 158.

CHAPTER VI.

TRANSFER OF TITLE TO PERSONAL PROPERTY.

SECTION 1. IN CONSEQUENCE OF JUDICIAL PROCEEDINGS.

§ 38. **Judgments in rem.** Two classes of judgments are recognized, judgments *in rem* and judgments in *personam*. The importance of the distinction, with respect to the transfer of title to personal property, lies in the nature of the title conveyed to a purchaser of property sold under one or the other kind of judgment. The principal difference is as to the conclusiveness of the judgment in cutting off the rights of parties interested in the property. A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose (1). Where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties (2).

A certain ship had been condemned by a French admiralty court as a Dutch ship, France and Holland being then at war. The plaintiff purchased the ship on the sale held under the decree of the admiralty court. The

(1) Woodruff v. Taylor, 20 Vt. 65.

(2) Mankin v. Chandler, Fed. Cas. No. 9030.

ship was not in fact a Dutch ship but was an English ship. The defendants, servants of the English owner, seized the ship on his behalf. In an action of trover the plaintiff recovered (3). The proceeding was one in rem and good against the world by the law of nations. In such cases the tribunal has jurisdiction not merely over the rights of the parties, but also over the disposition of the thing itself, and it directs that the thing itself and not merely the interest of a particular party be sold. Hence, all rights of all persons claiming an interest in it are cut off, and a perfect title is conveyed to a purchaser under such a judgment.

§ 39. **Judgments quasi in rem.** There is a class of judgments that appear to be judgments in rem in that they direct the disposition of particular property or determine its ownership but which are not true judgments in rem because they do not purport to bind any persons except those who have been made parties to the proceeding. Thus, in an action against A the goods of B were attached. B was not a party to the attachment suit. It was held that the attachment did not bind the goods or cut off the rights of B. Although the attachment proceedings are called in rem, the attaching creditor can acquire through his attachment, no higher or better rights to the property or assets attached than the defendant had when the attachment took place (4). In such cases if the property is sold, the purchaser acquires no other or better title than the defendant had.

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(3) Hughes v. Cornelius, 2 Show. 232.

(4) Samuel v. Agnew, 80 Ill. 553.

§ 40. **Judgments in personam.—Execution sales.** A judgment in personam is one which operates only upon those who have been duly made parties to the record and their privies, being against a person merely, and not settling the status of any person or thing. The ordinary case of a judgment for damages, rendered in an action on a debt or for damages for a tort is an example of a judgment in personam. It is simply an adjudication that A recover from B such a sum of money and have execution therefor. By virtue of the judgment a writ of execution issues, and under the authorization of the writ the sheriff seizes personal property of the judgment debtor and sells it at public auction sale and out of the proceeds pays the judgment.

The defendant was owner of a shearing machine and let it for hire to one Freeman. While in Freeman's possession the machine was seized by the sheriff as Freeman's property by virtue of an execution against him and was sold at sheriff's sale. The purchaser later sold the machine to the plaintiff. The defendant took the machine from the plaintiff's possession, and the latter brought trespass. The court held for the defendant on the ground that a sheriff's sale on execution can convey no greater title than the debtor had in the property sold (5). In such cases the sheriff sells only the interest of the debtor in the property. The property is sold, not like property sold under a judgment or decree in rem which directs the sale of the specific thing and which judgment is binding upon everybody, but by virtue of

(5) Griffith v. Fowler, 18 Vt. 390.

a judgment against an individual merely for a sum of money and a writ which authorizes the sheriff to sell the debtor's property and his only. If he seizes the property of another he is not protected by his writ and is merely a trespasser.

§ 41. **Effect of satisfaction of judgment.** If A converts B's property, A does not acquire title by his wrongful act. B has the title and the option of recovering the specific property by an action of replevin or of bringing an action of trover for damages. If he does the latter, it is manifest he should not both retain title to the converted property and recover damages for its value. The question, therefore, arises as to the effect of obtaining a judgment in an action of trover and of the satisfaction of such judgment in transferring title to the converted property.

In Brinsmead v. Harrison (6) the court had to consider the question whether a judgment in trover without satisfaction changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It was held that the only way the judgment in trover can have the effect of vesting the property in the defendant is by treating the judgment as being an assessment of the value of the goods and treating the satisfaction of the damages as payment of the price as upon a sale of the goods; that is, that title is not changed

(6) L. R., 6 C. P. 584.

until the judgment is satisfied. The theory of the court was that the judgment, which is only in personam and not in rem against the goods, can have no specific effect upon the title to the goods. That still remains in the plaintiff until the judgment is satisfied, and then it vests in the defendant.

In Smith v. Smith (7), A had recovered a judgment in trover against X. Before the judgment was paid A retook the property. Then X paid the judgment and now brings this action for the retaking by A. The court held for X. The title did not pass to X until payment of the judgment, but when the judgment was paid the title passed and it vested in him by relation as of the time of the original conversion, that being the time at which the value of the property is taken for the purpose of measuring the damages in the trover action. Consequently A was liable for re-taking the property although he did it before the judgment in the trover action was paid.

In Miller v. Hyde (8) A converted plaintiff's horse and sold it to B. Plaintiff recovered a judgment in trover against A, and execution was issued and levied upon the horse, but before the horse was sold it was replevied from the officer by B. Later plaintiff brought this action of replevin against B. The judgment against A remained unsatisfied and B's replevin action against the officer was still pending undetermined. In plaintiff's replevin action it was held for the plaintiff; that title did not pass to the convertor until the judgment was satis-

(7) 51 N. H. 571.

(8) 161 Mass. 472.

fied; that this was so even though the plaintiff had levied on the horse under the judgment in the trover action; the theory being that while the title remained in the plaintiff until satisfaction of the judgment, he consented by his action that if the property should be sold and the proceeds applied on the judgment he would waive his paramount title, but as that was prevented, plaintiff's title was not divested, although it was contended that when plaintiff by levy or otherwise says by his conduct that he intends to collect the debt and does that which affects the interests of the defendant in that particular, he should be deemed to have conclusively elected to treat the title as having passed to defendant.

Section 2. By Statutes of Limitations.

§ 42. **In general.** There is no reason in the theory of the common law why, if one has a right of action against another for the recovery of personal property or for damages for the converting of it or injury to it, he should lose that right of action by lapse of time. It has, however, wherever our system of law has prevailed, been deemed to be in the interest of public policy to place an arbitrary limit by statute upon the period within which such actions can be brought. Statutes known as statutes of limitation have, accordingly, been passed which generally provide, in substance, that no such actions shall be maintained unless brought within a certain period after the right of action first accrued. The period varies in different jurisdictions. It will be observed that, in form, such a statute merely prevents the bringing of the action,

i. e., bars the remedy, and says nothing about a change of title.

The question arises what is the effect upon the title where A has converted B's property and retains possession of it for the statutory period. If B still has the title after the expiration of the period, the statute merely prevents his bringing an action for the property and he can re-invest himself with complete ownership if he can regain possession.

§ 43. **Effect of statute in passing title.** In Fears v. Sykes (9) A converted the plaintiff's slave in 1839 and sold her to B, who held open and notorious possession in the state of Alabama until 1853, when he sold her to the defendant who brought the slave to Mississippi. Plaintiff brought this action to recover the slave in Mississippi. It was held that he could not recover. The possession by B in Alabama gave him a title which he conveyed to the defendant. It was a title available everywhere. If the Alabama statute had merely barred plaintiff's remedy he could have maintained his action in Mississippi against the defendant. So, where A's personal property was adversely held by B in the state of Georgia for the statutory period and A covertly obtained possession of the property and took it to Alabama, it was held that B had acquired such a title that he could maintain trover against A in Alabama (10).

"The weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an asser-

(9) 35 Miss. 633.

(10) Howell v. Hair, 15 Ala. 194.

tion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title'' (10a).

§ 44. **Tacking adverse holdings.** If A has converted property and held for the statutory period and then sells it to B, the latter is protected because, as A had acquired title before the sale, he conveyed a good title to B. When, however, A has held the property for a part only of the statutory period and sells to B who holds for the remainder of the period, so that neither one has been in possession for the entire period, although the successive possessions of the two together exceed it, a more difficult question arises. As B has made a new conversion by buying the property, it is contended that a new cause of action has arisen and the statute begins to run afresh. Accordingly, where the plaintiff was owner of a lease which his son, without the plaintiff's knowledge or consent, deposited with one Bates to secure a loan, this occurring more than the statutory period before the plaintiff brought his action, and later and within the period Bates became bankrupt, and his trustee sold the lease to the defendant; it was held that the plaintiff might maintain an action for detinue and conversion against the defendant (11).

There is little authority on the question, but this view seems to be the one rather more generally taken. It is

(10a) Campbell v. Holt, 115 U. S. 620.

(11) Miller v. Dell, L. R. (1891), 1 Q. B. 468.

argued, however, on the other hand, that the statute passes title, not by its terms but by its effect, and it ought to have the same effect if the true owner has been out of possession the statutory period whether one or more have been in possession (12). The latter view is ordinarily taken where real property has been in the hands of successive adverse holders for the statutory period. See Title to Real Estate §§ 144-60. in Volume V of this work.

§ 45. **Increase of property in adverse possession.** In Bryan v. Weems (13) certain slaves were conveyed to trustees in trust for a woman for her life and after her death for her children equally. She had possession during her life and after her death her husband continued the possession. By his will he disposed of the slaves and their increase. Certain of the children brought a suit against the trustee and the representatives of the husband and the legatee for an accounting and a division. It was held that, as the husband had had adverse possession after his wife's death for the statutory period, the statute of limitations was a bar to the suit and that the ownership of the increase of the female slaves followed that of their mothers, although the offspring themselves might not have been in adverse possession for the full period. The defense of the statute relates back to the first taking and carries with it all intermediate profits. The increase follows the mother as an incident unless as

(12) There are some dicta in support of this view. See Bohannon v. Chapman, 17 Ala. 696, and 3 Harvard Law Review, 323.

(13) 29 Ala. 423.

to such increase some act be done before the bar against the recovery of the mother is perfected which prevents the application of this rule. The rule applies to cattle and any property subject to increase.

Section 3. By Gift of Chattel.

§ 46. **Delivery of gift generally necessary.** Irons v. Smallpiece (14) was an action of trover for two colts. The plaintiff's father had given them by parol to the plaintiff, but the colts were never delivered to plaintiff and remained in his father's possession until the latter's death, after which his executrix, the defendant, refused to give them to the plaintiff. It was held for the defendant. A gift of a chattel is not good without delivery.

In Cochrane v. Moore (15) the court made an elaborate examination of the question and came to the conclusion on the authorities that according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and, whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of a gift by deed and the other in the case of a contract of sale; but that, as regards gifts by parol, Irons v. Smallpiece (16) was correctly decided and is still the law.

§ 47. **What amounts to a delivery.** In Green v. Langdon (17) it was held that an endorsement by a mortgagee of payment on a mortgage, he intending to make a gift to

(14) 3 B. & Ald. 551.
(15) 25 Q. B. D. 57.
(16) See note (14), above.
(17) 28 Mich. 221.

the mortgagor, was a good gift of the debt to that extent to the mortgagor, because there could not be an actual delivery of part of the debt and all was done that could be done. And where a father procured a cattle brand to be recorded in the name of his child, and with it branded certain cattle, under circumstances that showed he intended to give them to the child, it was held that there was sufficient delivery to consummate the gift (18). Where the defendant said to the plaintiff, "I give you all my corn and all my hogs," and then took an ear of corn out of a wallet and said, "Here, take of the corn I have given you," and gave plaintiff the ear of corn, it was held to be a good gift of the corn but not of the hogs (19).

In Cooper v. Burr (20) A had been confined to her bed by illness for a number of years and had kept in her room a bureau and trunks containing gold and silver coin and jewelry. About six weeks before her decease, handing to the plaintiff, who lived with her and had taken care of her, the keys of the bureau and trunks, she said: "Mary, here are these keys. I give them to you. They are the keys of my trunks and bureau. Take them and keep them and take good care of them. All my property and everything I give to you." It was held that the language of the donor, accompanied by the delivery of the keys, evidenced the intention of the donor, and placed the donee in possession of the means of assuming absolute control of the contents at her pleasure and constituted a valid gift of the coin and jewelry in the trunks and bu-

(18) Hillebrant v. Brewer, 6 Tex. 45.

(19) Lavender v. Pritchard, 3 N. C. 513.

(20) 45 Barb. 9.

reau. In Hatch v. Atkinson (21) the court said: "Although delivery of the key of a warehouse or other place of deposit, where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of." The last two cases, however, may well be distinguished. In Hatch v. Atkinson the trunk was placed, after the keys were given, in the donor's own closet, where it remained under his own dominion and control, while in Cooper v. Burr the donee had access to the trunks and bureaus and full power of control over them although they were in the donor's room. Hatch v. Atkinson is more strict than the generality of cases, and it would seem that the remarks quoted above from that case should be taken to apply only where the donee does not have access to and power of assuming dominion over the trunk (22). Where the donor gave the key to a cupboard to the donee with the statement that he gave her the contents thereof, and the donee opened the cupboard and hastily examined the contents and then locked the cupboard and kept the key, the same court that decided Hatch v. Atkinson held it to be a good delivery (23).

(21) 56 Me. 324.

(22) See Marsh v. Fuller, 18 N. H. 360.

(23) Goulding v. Horbury, 85 Me. 227.

On the other hand, where A had a piano in her house and gave it to B, who was at the time living in A's house, and B used the piano, both before and after the gift, but there was no change in possession, it was held not to be a valid gift (24). Here there was nothing that could be construed as a delivery. It would seem that some symbolical act of delivery would be necessary. The court distinguished the last from a case where A pointed out to B certain cattle of A's which were running at large and B agreed to take them in payment of a sum due him from A, holding that this gave B dominion over the cattle and made a delivery (25).

A gift by parol is a present transaction and if the title is passed at all it is passed at once, so, where a father delivered a slave to his son residing with him and called upon persons present to take notice that he gave that slave to the son, but, at the same time, said that he claimed an estate in the slave for his own life, it was held that nothing passed to the son by such a parol gift (26).

§ 48. **Gift by deed under seal.** It is generally held that a gift by deed under seal is good without delivery of the chattel. Where, however, A made an instrument in writing, but not under seal, reciting that he gave certain enumerated chattels to several donees respectively, saving to himself the use and benefit during his natural life, it was held not to be a good gift because not by deed under seal; that a deed effectuates the gift not because the delivery of the deed is a symbolical delivery of the

(24) Willey v. Backus, 52 Ia. 401.

(25) Brown v. Wade, 42 Ia. 647.

(26) Anderson v. Thompson, 11 Leigh (Va.) 439.

property, but rather upon the principle of estoppel; the maker of the deed is estopped thereby from asserting that he has not granted thereby to the donee a power of control and dominion over the property conveyed by the deed. In the present case it could not have been good as a symbolical delivery of the property, if that were the principle, because by the terms of the gift no immediate delivery of the property was intended, but the donor was to retain the possession and control of it so long as he lived (27).

Section 4. By Other Methods.

§ 49. **Other methods.** The transfer of the title to personal property by sale, mortgage, gifts causa mortis, will, descent, bankruptcy, and so forth, are treated in the articles on Sales, Mortgages, Wills, and Bankruptcy, elsewhere in this work.

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(27) Connor v. Trawick's Admr., 37 Ala. 289.

CHAPTER VII.

COMMON LAW LIENS.

Section 1. Nature and Acquisition of Liens.

§ 50. **Lien defined.** A lien at common law is a right to retain possession of property belonging to another until a claim of the party in possession against the owner is satisfied (1). A lien may be given by contract, express or implied, or it may be given by the common law without any agreement. It is the latter class of liens that we consider in this chapter.

§ 51. **Bailment defined.** The term bailment frequently occurs in the cases relating to liens. It may be shortly defined as the holding possession of another's personal property in trust for some specific purpose (2). The bailee is the one who has possession. The bailor is he who has given the bailee possession.

§ 52. **Lien for labor in improving chattel.** Plaintiff had possession of a race horse belonging to A, which plaintiff had trained. While in plaintiff's possession the horse was sold to the defendant, and plaintiff gave up possession of the horse to defendant under an agreement by defendant to pay for the training in consideration of the abandonment by plaintiff of his lien. In an action to recover the cost of the training, the defendant contended

(1) Lawson on Bailments, § 26.

(2) Lawson on Bailments, § 5.

that there had been no lien and that plaintiff's detention of the horse was altogether wrongful, but the court said: "On the principle of the common law, that where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races" (3). But where the plaintiff delivered a horse to the defendant to be stabled and in an action of detinue brought by the plaintiff for the horse the defendant claimed the right to hold the horse by virtue of a lien for his charges, it was held that the defendant had no lien because he had done nothing for the benefit and improvement of the horse (4).

These two cases show that the test of the existence of the lien is whether the bailee has done something to the chattel to improve it by his skill and labor.

So, where the defendant pastured cows for the plaintiff, who came and took them and the defendant retook them, for which the plaintiff brought trespass, and the defendant justified his act by virtue of a lien for pasturing; it was held for the plaintiff that there was no lien, on the ground that no additional value was conferred on the article by the skill of the bailee (5). And it is the law that an agister has no lien unless allowed one by statute (6).

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(3) Bevan v. Waters, Mood. & M. 235.

(4) Judson v. Etheridge, 1 Cr. & M. 743.

(5) Jackson v. Cummings, 5 M. & W. 342.

(6) The refusal to allow an agister a lien seems to have arisen through a misunderstanding of the law. The question of an agister's

§ 53. **Express or implied contract for services.** In Chase v. Westmore (7) the question of the effect upon the lien of an express agreement as to compensation for the work done upon the property was considered. The defendants, who were millers, had ground grain for certain bankrupts, of whom the plaintiffs were assignees, on an express agreement as to the price. The grinding was all done under one bargain. No time or mode of payment was set, but there was an express agreement that so much per load should be paid. The grain was ground in various parcels at different times. At the time of the bankruptcy the defendants had a portion of the grain on hand, and claimed to hold it on a lien for the value of the whole grinding. In trover, it was held for the defendants; that they had the lien claimed. The principal question made in the case was whether an express agreement as to the price destroys the right to a common law lien for the value of work expended on an article, and the case established the law that such an agreement does not destroy the right to the lien and it exists whether the contract is express or implied (8).

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lien was first raised in Chapman v. Allen, Cro. Car. 271, in 1632. At that time a lien was not allowed when there was an express contract for remuneration, and, as in Chapman v. Allen there was an express contract, the lien was not allowed in that case. Later, the lien was allowed in cases of express contract, and in Jackson v. Cummings the judges seem not to have understood the real ground of the decision in Chapman v. Allen, but followed that case and held that there was no lien because the bailee did not improve the chattel. See 2 Harvard Law Review, p. 61.

(7) 5 M. & S. 180.

(8) The true origin of the common law lien seems to have been that at the early period before there was any action allowed on an

If, however, a tailor, for example, should make a suit from cloth belonging to a customer under an agreement that the suit should be delivered and the customer have time thereafter in which to pay for it, the tailor would be deemed to have waived his right to a lien and would have none. The provision in the contract for delivery before payment is inconsistent with the existence of the lien. In Chase v. Westmore the court said: "And we agree that where the parties contract for a particular time or mode of payment the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract."

§ 54. **Lien by custom of trade.** The defendant, a warehouseman, had stored goods for the owner. The plaintiff, general assignee of the owner, demanded the goods without tendering payment. Defendant refused to give up possession, and plaintiff brought trover. It was held that defendant had a lien on any part of all goods received at one time for his charges on all such goods (9).

If a principal delivers goods to his factor to be sold, or if the factor purchases good for his principal; in either case he has a lien on the goods for his charges (10).

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implied contract for services, the lien was allowed as the bailee's only means of enforcing payment. So the lien became established in cases where there was no express contract. When there was an express contract the bailee had an action and hence, originally, no lien. When Chase v. Westmore was decided there was an action on an implied contract. The court did not understand the true origin of the lien and could see no reason for a distinction between express and implied contracts.

(9) Steinman v. Wilkins, 7 W. & S. 466.

(10) See Bryce v. Brooks, 26 Wend. 367.

In Naylor v. Mangles (11) the court held that a wharfinger had a lien and said that liens were either by the common law, usage or agreement; that a lien from usage was matter of evidence; that the usage in the present case had been proved so often it should be considered as a settled point that wharfingers had the lien contended for. That is the true basis of this class of liens. The bailee does nothing to improve the property and by the common law test would have no lien, but where the custom has been proved and recognized by the courts it is established as law that the lien exists. The liens of factors and warehousemen are well established in the United States.

§ 55. **Lien where bailee bound to receive the goods.** In trover for goods delivered to the defendant as a common carrier, the defendant proved that he had offered to deliver the goods to the plaintiff if he would pay defendant his charges, but that the plaintiff refused. It was held that a carrier may retain the goods for his charges and a verdict was directed for defendant (12).

"By the common law an innkeeper is entitled to a lien for the amount of his charges on all the goods of his guest which are found in the inn." "The innkeeper being obliged by law to receive travellers and entertain them, is given by law, not merely the right to compensation from the guest, but also a lien on the goods of the guest in the inn, to the extent of his charges" (13). The usual explanation of both the carrier's and the innkeeper's liens is that wherever the law compels one to receive

(11) 1 Esp. 109.

(12) Skinner v. Upshaw, 2 Ld. Raym. 752.

(13) Beale, Innkeepers and Hotels, §§ 251, 252.

the goods of another the bailee is given a lien to secure his charges.

§ 56. **Specific liens.** An ordinary common law lien for work put upon the property of another is specific, i. e., for the charges for services on that article and nothing else. Thus, if A has repaired a pair of shoes for B and delivered them to B without being paid for them and, later, on another contract repairs another pair, A does not have a lien on the second pair for his charges on the first, either alone or together with the charges on the second pair itself, nor for any claim that he may have against B except the charges on the second pair.

Where, however, a quantity of logs were delivered on different days at the defendant's saw mill, under one contract to saw the whole quantity into boards, and the defendant sawed a part of them and delivered the boards to the bailor without being paid for the service, it was held that he had a lien for the amount of his account upon the residue of the logs in his possession (14). Here the sawing was an entire transaction, and the lien of the bailee for his whole compensation extended to every portion of the logs. The lien, however, was restricted to claims arising under that contract, and the defendant would have no right to retain any part of the logs to secure payment of claims arising from other transactions with the plaintiff.

Where the defendant in trover, a warehouseman, had stored goods for plaintiff's assignors, and had delivered part of them but retained a part claiming a lien for

(14) Morgan v. Congdon, 4 N. Y. 552.

charges, the court instructed the jury that though the defendant could not retain for the general balance of his account, he might retain for all the charges on all the goods forwarded to him at the same time. This was held to be correct and it was recognized that a warehouseman does not have a general lien (15).

In trover for goods retained by defendant, a common carrier, under claim of a lien for a general balance due, it was left to the jury to say whether the existence of such a lien was so generally recognized by custom that the parties contracted with reference to it, otherwise, the jury were charged, there would be no lien for a general balance; and this was held correct (16.). And it is the law that a common carrier has only a specific lien.

In Mulliner v. Florence (17) the plaintiff's horses, wagonette, and harness were held by the defendant under an innkeeper's lien Plaintiff tendered the amount due for the keep of the horses and demanded that they be given up to him. The court held that he must pay, not only for the keep of the horses but also for the entertainment of the guest who had brought them. The lien is on any part or all of the property for the expense of the keep of the property and of the guest. There is one contract, one debt, and one lien in respect of the whole of the charges. It is not a general lien, but like a common law lien on part of several articles for charges for improving all, where all the work is done under one contract.

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(15) Steinman v. Wilkins, 7 W. & S. 466.

(16) Rushforth v. Hadfield, 7 East 222.

(17) 3 Q. B. Div. 484.

§ 57. **General liens.** In Kruger v. Wilcox (18) a factor to whom a general balance on account was due from his principal, received goods from the principal and afterwards gave up possession to the principal. The goods were sold and the question was whether the factor was entitled to a preference out of the money by virtue of a lien. It was held that if there is a course of dealings and general account between a merchant and his factor the latter may retain the goods, or produce, for such balance of the general account, as well as for the charges, customs, etc., paid on account of the particular cargo. Although previous to this case it was in doubt, it is now well settled that a factor has a lien and may retain for a general balance; including responsibilities incurred in the execution of his agency.

In In re Witt (19) A had been accustomed to send goods to B for the purpose of shipping abroad. A became a bankrupt, and B, having on hand at the time various parcels of goods belonging to A, refused to deliver them to the trustee in bankruptcy until paid the charges due him. It was held that B had a general lien by custom; that packers had formerly been to a certain extent considered as factors and the general lien, having been established, still continued.

These cases establish the law to be that the common law gives only specific liens and that of the liens given because the bailee is bound to receive the goods and of

(18) Ambl. 252.
(19) 2 Ch. Div. 489.

the liens given by custom the only ones that are general are the factor's lien and in England (query as to the United States) a packer's lien.

§ 58. **No lien for detention charges.** In British Empire Shipping Company v. Somes (20) the defendants, who were shipwrights, had repaired a ship for the plaintiff and refused to surrender possession until their bill for repairs was paid or security given, and, the plaintiff doing neither, the defendants gave the plaintiff written notice that the defendants would charge storage from the time when the bill was rendered. The plaintiff, later, paid the whole amount claimed, under protest, and then brought an action for money had and received. It was held that the plaintiff was entitled to recover back the amount paid for storage. The defendants had a lien for the charges for repairs, but the law gives a bailee holding a chattel on a lien no right to charge for the expense of keeping it nor any lien therefor. There can be no implied promise on the part of the owner of the chattel to pay for it when it is being kept against his will.

Section 2. Liens Given by Wrongdoer.

§ 59. **Innkeeper's lien.** The early case of Robinson v. Walter (21) established the general principle that an innkeeper has a lien on property brought to the inn by a guest even if the property does not belong to the guest. In that case a stranger brought with him a horse to defendant's inn and, after staying some time, left the horse at the inn. In trover by the owner of the horse against

(20) E. B. & E. 353.

(21) 3 Bulst. 269.

the innkeeper, it was held that the innkeeper had a lien on the horse until paid for the keep of the horse, because the innkeeper is compelled to receive the guest.

It has since been settled that the lien is on every part of the property for the entire charges in respect to both guest and property (22).

In Threfall v. Borwick (23) a guest brought with him to defendant's inn a piano belonging to the plaintiff, but which the defendant supposed to belong to the guest. The defendant retained it to secure the bill of the guest and the latter's wife and sister. In an action by plaintiff for the detaining it was held for the defendant. He had the lien claimed. Although the property here was of a kind that the innkeeper might not, perhaps, have been obliged to receive as the guest's baggage, yet he did receive it, thinking it to belong to the guest and had his lien on it. The decision seems to be based principally upon the ground that as the innkeeper is responsible for the property he should have a lien to secure his charges.

§ 60. **Same: Property known to be bailed to guest.** In Broadwood v. Granara (24) the defendant, an innkeeper, detained plaintiff's piano for the hotel bill of a person to whom plaintiff had lent the piano. The defendant knew that the piano belonged to the plaintiff and that it had been lent to the guest. The guest had had the piano sent to the hotel after he had come there as a guest. The plaintiff demanded the piano when the guest left the

(22) See Mulliner v. Florence, § 56, above. In this case the property was left at the inn by a guest who was not the owner of it.

(23) L. R., 7 Q. B. 711.

(24) 10 Exch. 417.

hotel, and, on refusal by the defendant to allow it to be taken, brought trover It was held that the defendant did not have a lien. The court said it was not the case of goods brought by a guest to an inn as his goods; that the piano was sent to the guest at the hotel for a particular purpose; that the lien cannot be claimed except in respect of goods which the innkeeper is bound to receive; and the fact was emphasized that the innkeeper knew the goods did not belong to the guest.

In Robins and Company v. Gray (25) a commercial traveller brought certain sewing machines, the property of his employers, the plaintiffs, to defendant's hotel, for the purpose of selling them to customers in the neighborhood. While the guest was in the hotel the plaintiffs sent him from time to time more sewing machines for the same purpose. He left without paying his bill and left in the hotel some of the machines so sent. Before the machines had been received into the hotel the defendant had been expressly told that they were not the property of the guest but belonged to the plaintiffs; but the defendant received the goods into the hotel as the guest's baggage. The defendant refused to allow the machines to be taken from the hotel, claiming a lien for the amount of the guest's bill upon the machines left by him at the hotel. It was held that defendant had the lien claimed; that whether the goods are goods that he might have refused to take in is immaterial if he does take them in as the guest's luggage; that it is also immaterial that the innkeeper knows the goods do not belong to the guest and

(25) (1895) 2 Q. B. 501.

that the fact that some of the machines were sent to the inn after the traveller had gone there made no difference, because the innkeeper accepted them as he had accepted the machines originally brought to the inn by the traveller — as the goods of the traveller, but not as his property.

In respect to Broadwood v. Granara, the master of the rolls said: "There the proposition that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods was fully recognized. The judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with the decision is immaterial. The case was expressly decided upon the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned judge in the court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper."

§ 61. **Same: Summary.** It has been suggested (26) that the real reason for denying the lien in Broadwood v. Granara was the definite bailment relation between the owner and the guest, known to the innkeeper. Whether that or any other is a sufficient ground of distinction between Broadwood v. Granara and Robins and Company

(26) Beale, Innkeepers, p. 185.

v. Gray or not, it is certain that any doubts as to the innkeeper's right to the lien, even when he knows the goods do not belong to the guest, that were raised by Broadwood v. Granara, have been set at rest by Robins and Company v. Gray; and it is now clear law that the innkeeper has the lien in such cases notwithstanding his knowledge as to the ownership if he receives the property as being baggage of the guest. Further, the dicta in the later case and the decision in Threfall v. Borwick (27) justify us in regarding it as law that the lien exists even if the property is of a kind that the innkeeper is not obliged to receive if he, in fact, does receive it as baggage of the guest.

§ 62. **Same: Guest's possession known to be wrongful.** Johnson v. Hill (28) was an action of trover brought by the true owner of goods against an innkeeper who had refused to deliver the goods on demand, asserting a lien. The goods had been illegally seized under color of legal process, and taken by the wrongdoer to the inn. On the trial of the action, the court charged the jury that "the question was whether the defendant knew, at the time when the horse was delivered into his custody, that Pritchard was not the owner of the property, but a mere wrongdoer; if he knew that fact, he made himself a party to the wrongful act of Pritchard, and could not insist on any recompense for keeping the horse." As applied to cases where the possession of the guest is wrongful and

(27) See note (23), above.

(28) 3 Stark. 172.

the innkeeper knows that fact, this doctrine is undoubtedly correct.

§ 63. **Carrier's lien.** If A, being in possession of the goods of B, wrongfully and without the consent of B, express or implied, ships them by a common carrier, who acts in good faith, supposing A to be the owner of the goods or to have authority to ship them, and then B demands the goods, there is a question whether the carrier has a lien on the goods for the freight charges. In Robinson v. Baker (29) it was held that on the general principle that no one can give a better title to property than he has, and that a carrier is subject to the same obligation to inform himself of the title of those with whom he deals that are other persons and because he can protect himself by demanding payment of the freight in advance, the carrier does not in such cases have a lien. The case represents the weight of American authority.

Section 3. Loss of Lien.

§ 64. **A lien ordinarily gives only a right to hold the property.** In an action of trover for three horses, the defendant pleaded that he was an innkeeper, that the plaintiff had put up his horses at defendant's inn and there was due him for their keep £36 which was more than they were worth and that he detained and sold them. Judgment was given for the plaintiff on the ground that

(29) 5 Cush. 137.

the defendant had no power to sell the horses (30). So, where the plaintiff's horse, wagonette and harness were brought to defendant's inn by a guest who did not own them, and the guest departed leaving the property and owing a bill, the defendant sold the horse and refused to give up the other property to the plaintiff. In trover for the conversion of all the property it was held for the defendant as to all the property except the horse. He had a right to hold it under his innkeeper's lien. But as to the horse, it was held for the plaintiff. The sale of the horse destroyed the lien upon it and was a conversion (31).

§ 65. **Lien cannot be transferred.** A broker and factor purchased goods in a warehouse in his own name for his principal, the plaintiff, who was indebted to the broker for a general balance of account, for which the broker had a lien. The broker, for a valuable consideration, assigned the goods by way of pledge to the defendant who claimed a lien in the place of the broker. In trover by the principal, the owner of the goods, it was held for the plaintiff. The defendant did not have the lien claimed. The court said: "Nothing could be clearer than that liens were personal, and could not be transferred to any third person by any tortious pledge of the

(30) Jones v. Pearle, 1 Stra. 557. Before implied assumpsit was allowed, an innkeeper had a right to sell a horse left with him as soon as it had eaten its value, in cases where there was no express contract, because, having no right of action, the innkeeper would find the horse only a source of expense. The Hostler's Case, Yelv. 66, 67 (1605). But when the implied assumpsit was allowed, the reason for the right of sale no longer existing, the right disappeared.

(31) Mulliner v. Florence, 3 Q. B. Div. 484.

principal's goods" (32). When the broker let the goods go out of his possession the lien was destroyed, and the owner of the goods was entitled to possession of them. "The right of lien has never been carried further than while the goods continue in the possession of the party claiming it" (33).

The bailee could, however, place the goods in the hands of his servant to hold for him, for the possession would still be constructively in the bailee, and it seems he could put them in a warehouse in his own name, for he would retain control (34).

§ 66. **Waiver of lien.** In Jacobs v. Latour (35) the defendant had a horse in his possession that he had been training. He brought an action against the owner of the horse for the charges, had the horse taken and sold on the execution, and bought it in. A commission of bankruptcy was issued against the owner of the horse upon an act of bankruptcy committed before the levy and sale. The assignee in bankruptcy brought an action of trover for the horse. The horse had never been out of the possession of the defendant. It was held for the plaintiff, that when the defendant allowed the horse to be taken and sold on the execution without setting up his lien, the lien was lost. As the execution sale was not good against the

(32) M'Combie v. Davies, 7 East 5.

(33) Sweet v. Pym, 1 East 4.

(34) It is to be noted that while a factor cannot pledge goods so as to bind his principal, from the nature of his employment he has implied power to sell and bind his principal by the sale. See 2 Kent Comm. 622.

(35) 5 Bing. 130.

bankruptcy commission, the defendant could not hold the horse by virtue of it and had no right to do so on either ground. Here the reason for the loss of the lien was that the sheriff, in law, must have had possession in order to make the sale, and when the defendant gave up possession to the sheriff he lost his lien, and his later holding must have been by virtue of the title derived from the sale.

Where the plaintiff had possession of certain calf skins on which he had a lien for work done upon them as a currier and purchased them from the owner who soon thereafter became an insolvent, the defendant took possession of the skins under a warrant issued to him as messenger in insolvency proceedings. The plaintiff, after his purchase, had never claimed to hold by any other title than by the sale to him and gave the defendant no notice of the lien when the property was taken. In an action for the taking, it was held that the sale was good between the parties but void as to creditors; that the plaintiff lost his lien by claiming to hold as owner and by not setting up his lien when defendant took the property (36). Here there was not even a technical change of possession, such as there was in Jacobs v. Latour, but the plaintiff was claiming to hold under a title other than that of his lien. He did not assert his lien and never claimed to hold by any other title than that derived from the purchase. Clearly, therefore, the lien was waived.

In White v. Gainer (37) the defendant had a lien for

(36) Mexal v. Dearborn, 12 Gray 336.

(37) 2 Bing. 23.

work on some cloth belonging to a bankrupt. The latter sold it to the defendant, which sale was void because made by a bankrupt. When the assignees demanded the cloth the defendant refused to give it up, saying: "He might as well give up every transaction of his life." But he made no demand. In trover by the assignees, it was held that the remark did not constitute a waiver of the lien and the defendant succeeded in the action. The court interpreted the remark to mean that the defendant was claiming to hold under his lien and not relying on the purchase, and they said that if the defendant had relied on the purchase they would have held it to be a waiver. It may be open to question whether that interpretation was correct and whether it should not have been left to the jury to say how the defendant intended to hold the cloth; but there can be no doubt of the correctness of the principle applied. There had been no change of possession and as the lien was asserted (as the language was construed) there was no reason for holding that the sale to him caused him to lose his lien. It appears, therefore, that the distinction between Mexal v. Dearborn (38) and this case is that in the former the bailee relied on his purchase and did not hold under or assert his lien and that if he had done so the lien would have been preserved.

§ 67. **Waiver excusing tender.** In an action of trover for some brandy which lay in the defendant's cellars, it appeared that certain warehouse rent was due to the defendant on account of the brandy, and that when the brandy was demanded, the defendant had refused to de-

(38) See note (36), above.

liver it up, saying it was his own property. The court held that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, and the plaintiff could recover without tendering the amount of the charges due (39). Here the bailee claimed rights in the property totally inconsistent with the lien. When the demand was made his reply did not inform the owner of the nature of the claim against the property or what he should tender in order to reclaim it. The lien was, therefore, properly held to have been waived. And where the plaintiff delivered to the defendants a quantity of hogs' heads to be rendered into lard, and the defendants, after delivering part of the lard, "declined to deliver any more lard;" the plaintiff demanded the lard but made no tender. It was held for the plaintiff in an action of assumpsit for failure to perform the contract, the court saying: "An unqualified refusal upon a demand duly made is evidence of a conversion because it involves a denial of any title whatever in the person who makes the demand;" and that the plaintiff had a right to infer from the defendants' answer to his demand that they would deliver to him no more lard unless compelled to do so by an action at law, and also the right to infer that a tender to the defendants for their services would be unavailing (40).

In Scarfe v. Morgan (41) the defendant had possession

(39) Boardman v. Sill, Camp. 410, note.

(40) Hanna v. Phelps, 7 Ind. 21.

(41) 4 M. & W. 270.

of a mare sent to be covered by his stallion, and refused to deliver her to the owner, claiming a lien for the charge for the particular occasion, and, also, for charges for covering other mares and for poor rates. The plaintiff, without making any tender at all brought trover. It was held that the defendant had a specific lien for the services of the stallion on the particular occasion and did not lose it so as to excuse a tender on the part of the plaintiff by reason of claiming in addition to hold the mare for other charges for which he did not have a lien. The theory of the court was that the larger claim included the smaller and that in claiming both he did not mean to excuse a tender of the sum for which the lien actually existed. It was observed that if a tender had been made the defendant might have been led to reflect whether he had a lien for the additional sums and he might have accepted the tender. If the conduct of the bailee did not, in fact, indicate that a tender of the smaller sum would be useless, the case is right.

Kerford v. Mondel (42) was a case in which the owner of a bark carried freight on which he claimed a lien for freight and dead freight, not being entitled to the latter. He refused to deliver the goods, stating that he had called a meeting of the consignees of the goods to decide the question about dead freight, and that he would communicate notice of the meeting to the plaintiff. The court, being authorized to draw inferences of fact, said: "We conclude that the defendant here, in effect, said, 'I claim these goods in respect of the lien for two different

(42) 28 L. J. (N. S.) 303.

items; you need not trouble yourself to tender one of them, because if you do so, I shall not deliver them up; I shall keep them for the other.' If that is so, it is a reasonable thing to show that he dispenses with what he owned would be a nugatory tender of the sum he was entitled to receive." The distinction between this and the last case must be based upon the interpretation of the defendant's conduct in Kerford v. Mondel as more clearly indicating that a tender of the one sum would be useless than did that of the bailee in Scarfe v. Morgan. And, in fact, the bailee's statement, in Kerford v. Mondel, in regard to the matter of the dead freight appears to be an absolute refusal to deliver up the goods until that question was settled.

§ 68. **Lien of livery stable keeper.** Unless also an innkeeper and receiving a horse in his capacity as such for a guest, a livery stable keeper would not at common law have a lien on a horse boarded with him. But statutes giving such liens are not uncommon.

In Caldwell v. Tutt (43) the livery stable keeper was by statute given a lien the same as the innkeeper's lien at common law. A had boarded his horse with livery stable keepers, the plaintiffs. A was in the habit of taking the horse occasionally from the stable for a ride, by and with the consent of the owners of the stable. While A was riding the horse on one of these occasions, the horse was levied upon by the defendant, a constable, by virtue of an execution against A. On the question whether the plaintiffs had a lien superior to the execution levy, it was

(43) 10 Lea (Tenn.) 258.

held that the custom of allowing the horse to be taken temporarily from the stable, in accordance with the terms of the contract, did not destroy the lien of the stable keeper, and that the rights of the latter were superior to the claim of the execution creditor. Ordinarily when the bailee parts with possession, he loses his lien. The decision is based upon the peculiar nature of the contract of bailment which contemplates the temporary relinquishment of the possession of the property by the bailee, and the court held the preservation of the lien, under the circumstances, to be within the spirit of the rule recognized by the law.

In Vinal v. Spofford (44) a horse was boarded at defendant's livery stable. While temporarily absent therefrom, in use by the owner, it was sold to plaintiff and later returned to the stable without any notice being given to defendant of the change in ownership. Later, the bill for the keep of the horse not being paid, the defendant caused the horse to be seized, when it was absent from the stable in use, and brought to the stable. In replevin it was held that defendant lost his lien by the sale, and even if he had a lien for the keeping of the horse after the sale, or whatever might be the rule when the animal was voluntarily restored to his possession, he lost the lien by allowing the plaintiff to take possession and could not revive his right by seizing the horse. The court, thus, made no distinction between livery stable keepers and other bailees and applied the ordinary rule prevailing in the case of common law liens.

(44) 139 Mass. 126.

CHAPTER VIII.

PLEDGE.

§ 69. **Nature of a pledge.** A pledge or pawn is the bailment of a chattel as security for the payment of some debt or the performance of some engagement. The bailee has a lien on the pledged property, given him by the contract (1). Upon payment of the debt or performance of the engagement for which the pledge was made he is to return the identical property to the pledgor. If the pledgor makes default in payment or performance, the pledgee's remedy is to sell the pledged property, and the contract of pledge gives the pledgee power to do so; wherein the pledgee differs from the bailee under a common law lien. The usual practice is to sell at public auction after notice. If the sale is made in such manner, honestly and fairly, the pledgee is not liable for a loss that may ensue to the owner from the property realizing less than its estimated value. If he sells without notice, it seems he would be charged with the full value of the property (2). Or, the pledgee may foreclose his lien by a bill in equity. Any surplus realized upon the sale is to be paid over to the pledgor.

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(1) For the distinction between a pledge and a chattel mortgage, see Mortgages, § 62, in Volume V of this work.

(2) Stearns v. Marsh, 4 Dem. 227.

§ 70. **Effect of transfer by pledgee.** In Johnson v. Stear (3) one Cumming had pledged some brandy with the defendant to secure a loan payable on January 29th and gave the defendant a dock warrant for the brandy. Cumming was declared a bankrupt on the 17th, the loan was not paid, and on the 28th the defendant sold the brandy and on the 29th delivered the dock warrant to the purchaser, who took possession on the 30th. This was an action of trover by the assignee in bankruptcy of Cumming. It was held for the plaintiff. Two questions were discussed by the court. First: Was there a conversion? And, second: If so, what was the measure of damages? The court held that the sale on the 28th followed on the 29th by the delivery of the dock warrant in pursuance thereof was a conversion. The pledgor had the whole of the day of the 29th in which to redeem the pledge. So the pledge was sold before default, and the pledgee put it out of his power to return the property if the amount of the loan was tendered him. On the other point, the plaintiff was allowed to recover nominal damages only. That is, the defendant was really allowed to offset his interest, the amount of the debt, against the value of the property. The real theory of the case is that the interest of a pledgee is a right of property in the goods which is more than a mere lien and that that interest is not destroyed if the pledgee sells before default. He does, however, by so doing make a conversion of whatever surplus interest the pledgor has in the property over and above the interest of the pledgee, in this case a merely nominal

(3) 15 C. B. (N. S.) 330.

interest, and, hence, an action can be maintained without any tender, but all that can be recovered is that surplus interest.

On this second point there was a strong dissenting opinion by one judge, on the ground that the sale of the property before default was tortious and destroyed the bailment, and that in consequence the title of the plaintiff to the goods became as free as if the bailment had never taken place. If the bailment really was destroyed by the sale, it would seem necessarily to follow on principle that the sale was a conversion, not merely of the pledgor's surplus interest in the property over and above the interest of the pledgee, but of the whole property and that all that was left to the defendant was a contract claim and that that could not be offset against a claim in tort for the conversion of the property.

§ 71. **Same (continued).** Donald v. Suckling (4) was detinue for certain debentures. The defendant pleaded that the plaintiff had pledged the debentures, as security for the payment of a bill of exchange with one Simpson, who had repledged them with defendant to secure a debt due the defendant from Simpson, and that the bill to secure the payment of which they were pledged to Simpson had not been paid. The case came up on demurrer to the plea. No tender of the sum secured by the original deposit was alleged to have been made by the plaintiff. It was assumed against the defendant, on the demurrer, that the repledge was made before default in payment of the bill and that the repledge was for a greater sum than the

(4) L. R., 1 Q. B. 585.

original debt for which Simpson held the debentures. The court held for the defendant, that the plea was good. The doctrine of the case is that when a pledgee repledges he does not destroy all his interest in the property and that, notwithstanding the repledge, the original pledgor cannot recover the specific property without paying or tendering the sum for which the original pledge was made. The case is in accord with Johnson v. Stear in holding that the interest of the pledgee is not destroyed by his transfer of the property. It was not necessary in the former case, in the view taken by the court, to require a tender or payment before allowing the action, because being an action for damages, they could restrict the damages to the value of the property over and above the amount of the defendant's interest which still existed; but in Donald v. Suckling, as the action was for the recovery of the specific property, there could be nothing in the nature of a set off, the whole property was recovered or it was not, there was no other alternative. Therefore, the only way in which the pledgee's interest could be protected was to require payment or a tender of the amount due him before the plaintiff could recover the property. This, it seems, is the only ground upon which the cases can be reconciled on the point as to the necessity of a tender. In Halliday v. Holgate (5) the owner of certain stock certificates had pledged them with the defendant to secure a demand note. Later the pledgor became a bankrupt. Thereafter the defendant, without making any demand, sold the stock. The plaintiff, assignee in bank-

(5) L. R., 3 Ex. 299.

ruptcy of the pledgor, without making any tender to the defendant, brought trover for the conversion of the stock. It was held for the defendant. The plaintiff was allowed to recover neither nominal nor full value damages. The court professed to follow Johnson v. Stear in not allowing full damages on the ground that an allowance must be made for the amount of the original debt, and to follow Donald v. Suckling in not allowing any action at all until the debt is paid, saying that until the debt was paid the pledgee had the whole present interest. The case is in accord with the two previous cases in holding that the pledgee's interest is not destroyed by a sale before default, but it is in conflict with Johnson v. Stear in requiring a tender before allowing an action of trover, and held that a sale by the pledgee does not constitute a conversion of the pledgor's interest because, until tender or payment, the pledgee has the entire present right of possession. On the point that an action may be maintained for the pledgor's actual damages before tender, Johnson v. Stear must be considered overruled.

§ 72. **Same (continued).** These three cases settle the English law and establish it to be that until payment or tender of the amount of the debt to secure which the pledge was made, the pledgee has the whole present interest and right of possession; that his interest is greater than that of a bailee under a common law lien; that that interest is not destroyed by his transfer of the property by way of repledge or sale before default; that such repledge or sale is not a conversion and that the pledgor cannot on account thereof bring trover or an action to

recover the specific property before tender of the amount of the original debt.

The American law is unsettled. Some of the cases adopt the English view that the pledgor is not entitled to a return of the property or an action for damages without making a tender, although the pledgee may have sold or repledged the property for a greater amount than the original debt (6). Others take the position that if the pledgee tortiously sells the pledged property, the pledgor may bring trover without a tender (7).

In Whipple v. Dutton (8) it was held in an action for the conversion of pledged property, where the pledgee had made an unauthorized sale of it, that the only effect was to entitle the pledgor to recover any damages sustained thereby, and, it appearing that the property had been sold for its full value and the proceeds applied on the debt, that the plaintiffs had no cause of action.

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(6) See Cummock v. Newburyport Savings Institution, 142 Mass. 342.

(7) Stearns v. Marsh, 4 Den. 227.

(8) 175 Mass. 365.

CHAPTER IX.

ACTIONS BY PARTIES TO BAILMENT.

Section 1. Actions By Bailor Against Bailee.

§ 73. **Trespass.** "If I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending" (1). The action of trespass lies for an injury to the possession. Consequently, in order to maintain it the plaintiff must, as a general rule, have had possession when the trespass was committed. In the passage quoted, however, Littleton seems to be putting the case of a gratuitous bailment and when the bailment is such the bailor has the right to terminate the bailment at any time and the immediate right of possession is deemed to be in him and, therefore, in such cases the bailor may maintain trespass against the bailee for an injury to the property. If, however, it be regarded as a bailment of hire for a definite period and the killing of the cattle be regarded as a destruction of the property, then, also, the bailor could maintain trespass, for the destruction of the property is regarded as so complete a termination of the bailment as to vest constructive possession in the bailor and give him the right to maintain trespass (2).

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(1) Lit. § 71.

(2) The origin of this principle, which is really a fiction, has been suggested to date from a period before the distinction between trespass and trespass on the case was clearly established.

Where a draper had a servant to sell cloths in his shop, and the latter took the cloths and converted them to his own use, it was held that trespass lay because the possession of the servant was the possession of the master (3). And in another case where a servant in a shop carried away his master's goods, it was held that the master could have trespass against the servant because the servant did not have the possession in the eye of the law (4).

§ 74. **Trover.** The plaintiff hired to the defendant certain theatrical property for a particular purpose. During the continuance of the contract, the defendant used it for an entirely different purpose, and to do so took it to pieces. The plaintiff brought an action of trover before the expiration of the contract term. The court held for the plaintiff, that the action lay. The taking the property to pieces and using it for a purpose different from that contemplated by the contract was treated by the court as a termination of the bailment, on the same principle as when there is a sale or destruction of the chattel by the bailee. The bailment being terminated, the bailor had the right of possession and could maintain an action of trover as for a conversion, although the original term of the bailment had not expired and under the terms of the contract the bailor was not entitled to possession when he brought his action (4a).

These cases show that, while a bailor out of possession could not generally maintain the possessory actions

(3) Anonymous, Moore 248, pl. 392.

(4) Bloss v. Holman, Owen 52.

(4a) Bryant v. Wardell, 2 Exch. 479.

against the bailee, yet where the bailment is such that constructive possession remains in the bailor or, if possession is in the bailee, when the wrongful act itself immediately determines the bailment, the possession at once revests in the bailor and he may maintain an action based on such possession.

SECTION 2. ACTIONS BY BAILOR AGAINST THIRD PERSON.

§ 75. **Trespass.** The plaintiff delivered his horse to another to be pastured, and the defendant took him from the pasture. The plaintiff brought trespass. It was held that the action would not lie because the horse was not in the plaintiff's possession (5). On the same principle, where the plaintiff had let a furnished house by lease to another and the furniture was seized by the sheriff on execution against the lessee, and the plaintiff brought trespass against the sheriff, it was held that he could not maintain the action because he did not have possession (6). Where, however, the plaintiff had made a gratuitous loan of his chaise to a friend, and, while it was in the latter's possession, the defendant ran against it and injured it, it was held that the plaintiff might maintain an action of trespass against the defendant (7). The reason for the distinction taken between this case and the preceding two cases is the gratuitous nature of the bailment, which gave the bailor a right to terminate it at any time and hence the immediate right of possession.

"It was to be expected that some action should be given

(5) Wilby v. Bower, Clayton 135, pl. 243.
(6) Ward v. Macauley, 4 T. R. 489.
(7) Lotan v. Cross, 2 Camp. 464.

to the bailor as soon as the law had got machinery which could be worked without help from the fresh pursuit and armed hands of the possessor and his friends. To allow the bailor to sue, and to give him trespass, were pretty nearly the same thing before the action on the case was heard of. Many early writs will be found which show that trespass had not always the clear outline which it developed later. The point which seems to be insisted on in the Year Books is, as Brooke sums it up in the margin of his abridgment, that two shall have an *action* for a single act—not that both shall have trespass rather than case. It should be added that the Year Books quoted do not go beyond the case of a wrongful taking out of the custody of the bailee, the old case of the folk laws. Even thus limited the right to maintain trespass is now denied where the bailee has the exclusive right to the goods by lease or lien, although the doctrine has been repeated with reference to bailments terminable at the pleasure of the bailor. . . . So far as the possessory actions are still allowed to bailors, it is not on the ground that they also have possession, but it is probably by a survival, which has been explained, and which, in the modern form of the rule, is an anomaly. The reason usually given is, that a right of immediate possession is sufficient—a reason which excludes the notion that the bailor is actually possessed'' (8).

§ 76. **Trover.** The plaintiff was the owner of certain household furniture and had hired it to one Biscoe. While the furniture was in Biscoe's possession, it was seized by the sheriff on an execution against one Borrett who had

(8) Holmes, Common Law, 171-175.

been owner of the furniture before the plaintiff bought it. The plaintiff brought an action of trover. The furniture was seized by the sheriff and the action was brought and tried before the time for which the goods were hired had expired It was held that the plaintiff could not maintain his action. He did not have possession nor the right to possession until the end of the time for which the goods were hired (9). To maintain trover the plaintiff must have been in possession or have the right to immediate possession. In Smith v. Sheriff of Middlesex (10) the plaintiff had hired goods to a married woman living at that time apart from her husband under a deed of separation. The contract was held to be invalid as she was not capable of contracting with the plaintiff for the hire of the goods and it did not bind her husband. While in her possession the goods were taken on execution against her husband, the seizure being illegal. It was held, that the plaintiff could maintain an action of trover. The plaintiff had the present right of possession. He could terminate the bailment at any time by demand. It was terminated by the defendant's act, and the plaintiff became immediately entitled to the possession of the property.

§ 77. **Case.** In Hall v. Pickard (11) the plaintiff was the owner and proprietor of two horses which were hired for a certain term to A. While A was driving them, attached to his carriage, along the public highway, the defendant negligently drove a cart against them, whereby one of them was killed. The court held that the plaintiff

(9) Gordon v. Harper, 7 T. R. 9.

(10) 15 East 607.

(11) 3 Campbell 187.

could maintain an action on the case. As the horses were not in his possession he could not have maintained trespass, and, as he was not entitled to their possession until the end of the term for which they were hired, he could not have trover. But the injury was one to the plaintiff's reversionary interest, and for such an injury an action on the case is the proper remedy.

§ 78. **Effect of bailee's lien on bailor's right of action.** Ames v. Palmer (12) was an action of trover by the owner of certain personal property which had been taken from a common carrier by the defendant, an officer, on an illegal execution. The court instructed the jury that it was incumbent upon the plaintiff to satisfy them by proof that the plaintiff had both the property and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained. The jury found for the defendants on the ground that the freight had not been paid, and the claim of the carrier had not been waived. On appeal the case was reversed, the court holding that a common law lien for services rendered is of such a nature that it does not deprive the general owner of the right of immediate possession, as against the wrongdoer; and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. The theory of the court was that by suffering the property to be attached, the bailee lost his lien; that it is a personal privilege to be asserted by the

(12) 42 Me. 197.

bailee on his own behalf; that, subject to the lien, the owner was entitled to possession and that, therefore, the lien was no bar to the owner's right of action as against a wrongdoer.

In Wilson v. Martin (13) the plaintiff was the owner of some harnesses and delivered them to one Page to be cleaned and oiled. Page cleaned and oiled them, and, while they were in his possession and after he had performed the service aforesaid on them, they were attached by the defendant as deputy sheriff, upon a writ against one Morrison as the latter's property. Page asserted his lien and refused to allow the harnesses to be taken from his possession until he was paid for his labor, and it was agreed between the defendant and Page that the harnesses should remain in the latter's possession. Two days after the attachment, plaintiff, after demanding the harnesses of the defendant, brought an action of trespass against the defendant. It was held for the defendant. The plaintiff had not had possession to lay a foundation for an action of trespass. The property had been and still was in the rightful possession of Page who was entitled to hold them until paid for his services and was holding under his lien.

Plaintiff could not have maintained trover since he lacked not only possession but also the right to possession. In Ames v. Palmer the property had actually been taken from the possession of the bailee and the decision was simply that the bailee's right, whatever it might be, could not be set up by the wrongdoer as against the general

(13) 40 N. H. 88.

owner who was entitled to possession subject to the bailee's rights, which rights had not been asserted. In Wilson v. Martin the bailee's rights were being asserted and enforced.

Section 3. Actions by Bailee Against Third Person.

§ 79. **In general.** That the bailee, having rightful possession, can maintain the various possessory actions has long been well established.

Thus, where cattle were lent to plaintiff to manure and improve his land, and they were wrongfully taken by the defendant the plaintiff was allowed to maintain replevin for them (14). Where the owner of cattle bailed them with an agister, the plaintiff, and the defendant took them for arrears of rent due from the owner, it was held that the plaintiff could maintain an action of trespass for the taking (15). In Rooth v. Wilson (16) the plaintiff's brother sent to him a horse, which the plaintiff put in his close, and, by reason of defects in the fence, due to the negligence of the defendant, the horse fell into the defendant's close and was killed. The bailment was gratuitous. The plaintiff brought an action on the case. It was held that he could recover. His possession was sufficient to enable him to maintain the action, although he did not have title to the property and although it was a merely gratuitous bailment and could have been terminated at any time by the bailor.

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(14) Anonymous, Year Book, 11 Hen. IV. 17, pl. 39.

(15) Anonymous, Year Book, 48 Edw. III., 20 pl. 8.

(16) 1 B. & Ald. 59.

In Burton v. Hughes (17) the owner of furniture had hired it to plaintiff by an agreement void because not stamped. The defendants seized the furniture under a commission of bankruptcy issued against another person. The plaintiff brought an action of trover and it was held that his simple possession was sufficient to enable him to maintain the action. In Van Bokkelin v. Ingersoll (18) it was held that a carrier who was holding goods under his carrier's lien could maintain trover against one who took the goods from his possession.

Thus, a bailee, whether gratuitous or for hire or holding under a common law lien, has the possessory actions, his right being based on the ground of the injury to his possessory interest.

§ 80. **Measure of damages.** In actions by the bailee, it may be said that in general the bailee may recover the full value of the article in trover, or the full amount of the damage done in trespass and case, and is responsible over to the bailor for the damages so recovered. For fuller treatment of the question see the article on Damages in Volume X of this work.

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(17) 2 Bing. 173.

(18) 5 Wend. 315.

CHAPTER X.

FINDING.

Section 1. Obligations of Finder to Owner.

§ 81. **Care of property.** No law compels one who finds the property of another to take charge of it but if he does take it into his custody he becomes a gratuitous bailee for the benefit of the owner and is subject to a certain amount of responsibility in respect to it.

In an action of trover for butter that defendant had found, the declaration alleged that he so negligently cared for it that it became of little value. On demurrer it was held that no action lay (1). The decision is right because there was no conversion and so no action of trover. It seems, however, there should be an action on the case if the finder, after assuming possession, is negligent in the care of the property. Thus, "If a man finds goods, an action upon the case lieth, for his ill and negligent keeping of them, but no trover and conversion, because this is but a non fesans" (2).

Where the defendant found the plaintiff's horse, took and kept it a week and used it so that, when he returned it, it was lame and unfit for use, it was held that the plaintiff could recover from the defendant for the in-

(1) Mulgrove v. Ogden, Cro. Eliz. 219.

(2) Per Coke, C. J., in Isaack v. Clark, 2 Bulst. 306, 312 (1615).

juries (3). The court said: "One who finds any species of personal property is under no obligation to take care of it. He may pass it by where he finds it, or, if he takes it in his possession and lays it away, and it becomes injured by want of any special care, he is not liable therefor. The same rule applies to a lost animal; but if the finder takes possession of such animal, and shuts him up, he would be bound to provide necessary sustenance for it. And if he goes further and uses such animal in a way that injures him, there can be no doubt that he is bound to make compensation for the injury."

§ 82. **Duty to return property to owner.** The finder of goods must make reasonable efforts to ascertain the owner and restore his property to him. This duty does not arise unless he chooses to take the goods into his custody. He is also said to be liable if he delivers them to the wrong person as owner, and he may therefore make a reasonable investigation before delivering them on demand of an alleged owner (3a).

Section 2. Rights of Finder Against Owner.

§ 83. **Finder's lien: For expenses.** The owner of property always keeps his title to it, although it is lost and found by another. The question examined here is whether the finder has a lien on the property for his expenses incurred in the rescue and care of it or for a reward therefor.

In an action of trover for a dog, it appeared that the

(3) Murgoo v. Cogswell, 1 E. D. Smith (N. Y.) 359.

(3a) Isaack v. Clark, 2 Bulst. 306, 312; Wood v. Pierson, 45 Mich. 313, 320.

plaintiff's dog was lost and casually strayed to the house of the defendant who took care of it. When the plaintiff demanded his dog, the defendant refused to give it up until he was paid 20s. for twenty weeks' keep. It was held for the plaintiff (4). The defendant had no right to hold the dog for the expense of keeping it. So, where the plaintiff's timber floated away and was left by the action of the tide upon a towing path on the river bank, and the defendant was employed by the bailiff of the manor to remove it from the towing path, which it obstructed, to a place of safety, and, when the plaintiff claimed it, the defendant refused to give it up until paid a recompense, claiming a lien, it was held that the plaintiff might recover in trover. The defendant had no lien. Whether he had any claim that could be enforced by action or not, he certainly had no lien which would throw upon the owner the burden of estimating the value of the service rendered in the rescue and care of the property (5). The court held that the maritime law of salvage did not apply and, therefore, treated the case as one of mere finding and taking care of the thing found.

§ 84. **Same: For reward.** In Wentworth v. Day, (6) the plaintiff had lost his watch and offered a reward of twenty dollars for its return. The defendant's son found it. The defendant, acting for his son, refused to give up the watch until paid the reward. In trover by the owner, it was held for the defendant. There was a contract liability on the part of the plaintiff to pay the reward.

(4) Binstead v. Buck, 2 W. Bl. 1117.

(5) Nicholson v. Chapman, 2 H. Bl. 254.

(6) 2 Metc. (Mass.) 352.

No other time or mode of payment being named in the offer of the reward, it was implied that payment of the reward was to be simultaneous with the return of the property. Under such circumstances the finder has a lien to secure the payment. The lien is given because, under the contract, surrender of the property and payment of the reward are to be simultaneous.

In Wilson v. Guyton (7) the plaintiff had lost his horse and offered a "liberal reward" for its return. A had found the horse and offered to give it up to plaintiff upon payment of three dollars, which sum the plaintiff admitted was reasonable but did not pay. The defendant was holding the horse as agent for the finder. The plaintiff brought replevin and it was held that he could recover. The finder did not have a lien. Here the amount of the reward was not fixed. Neither owner nor finder could properly be made the sole judge. It could not be considered that the owner by his offer of an indefinite reward meant to give the finder the right to hold the property until the amount to be paid was determined, perhaps by litigation. The fact that the owner admitted that three dollars was a reasonable amount made no difference. That, at most, was a subsequent agreement having no effect on the question of the right to a lien, which must exist, if at all, by virtue of an implied term of the contract.

The question whether a finder has any right of action for his services and expenses in finding and caring for lost property in the absence of an offer of reward is one

(7) 8 Gill 213 (Md.).

on which the courts have differed. It is discussed in the article on Quasi-Contracts, § 37, in Volume I of this work.

SECTION 3. RIGHTS OF FINDER AGAINST THIRD PERSON.

§ 85. Finder has right of possession against all but true owner. The plaintiff had found some logs floating in Delaware Bay, which he took up and moored with ropes. The logs were afterwards in the possession of the defendants, who refused to give them up, alleging that they had found them adrift. In trover for the logs, on the trial of the action, the court charged the jury: "The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner, but that the logs were found by them adrift . . . and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them . . . So the subsequent loss did not divest the special property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict" (8).

In Armory v. Delamirie (9) it was held that the finder of a jewel could maintain trover against one who con-

(8) Clark v. Maloney, 3 Harrington (Del.) 68.

(9) 1 Stra. 505.

verted the property from the finder, and that the latter may keep the property against all but the rightful owner.

§ 86. **Prior possessor is first entitled.** In Durfee v. Jones (10) the plaintiff bought an old safe and soon afterwards instructed his agent to sell it. The latter left it with defendant, at his shop, for sale, authorizing him to keep his books in it until it was sold or reclaimed. There was a large crack in the lining, and the defendant, upon examining the safe, shortly after it was left with him, found secreted between the sheet iron exterior and the wooden lining, a roll of bills. Neither the plaintiff nor the defendant knew the money was there before it was found. The defendant refused to give up the money to the plaintiff when the latter demanded it. The plaintiff brought an action of assumpsit to recover the money or its equivalent. It was held for the defendant; that he was entitled to the money as a finder.

The case presents the most difficult question that arises in connection with the subject of finding; namely, who had priority of possession? Neither the plaintiff nor the defendant was absolutely entitled to the money, for the plaintiff, when he bought the safe, did not buy the money, but, as between the two, he who first acquired possession was entitled to retain it. The question in the case, then, resolves itself into the inquiry whether the plaintiff, knowing nothing of the money, had possession of it when the safe was in his possession. The decision must rest upon the theory that he did not. The court said: "But the plaintiff never had any possession of the money, except,

(10) 11 R. I. 588.

unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right." The decision is a very close one, and its correctness may well be questioned. It would seem that it depends upon whether it is right to say that the plaintiff exercised control and dominion over the money, when the safe was in his possession, in the absence of any knowledge of the money.

In Bridges v. Hawkesworth (11) the plaintiff, being lawfully in defendant's shop, found on the floor a package of Bank of England notes. He gave them to the defendant to keep until the owner claimed them. They were not claimed and three years later the plaintiff demanded them of the defendant, who refused to deliver them. The court held that the plaintiff was entitled to the money, and said that the notes never were in the custody of the defendant nor within the protection of his house before they were found. It was similar in kind but different in degree from finding on the road. Here was a public shop into which all were invited to enter. It seems right to hold that the keeper of the shop had never had possession of the notes, since he had not, while the shop was open, exercised his right to exclude others therefrom; in other words, had not been in exclusive possession thereof. If the notes had remained on the floor while the shop was closed over night, the case, it seems, would have been like the previous one, and the question would be whether being in exclusive possession of the shop would give the

(11) 15 Jur. 1079.

shopkeeper possession of the notes in the absence of knowledge of them.

In Hamaker v. Blanchard (12) the plaintiff, a domestic servant in a hotel, found money in the hotel parlor. She gave it to the defendant, the proprietor, to return to the owner. The owner was not found and the defendant refused to give up the money. It was held that the plaintiff was entitled to the money. This case was like finding on the floor of a shop. The hotel was a public place and the hotelkeeper was not in exclusive possession of the parlor.

§ 87. **Same (continued).** In South Staffordshire Water Company v. Sharman (13) the defendant was employed with other workmen to clean out a pool on plaintiff's land. While so employed defendant found in the mud at the bottom of the pool two gold rings. He refused to give them to the plaintiff and the latter brought detinue. It was held that the plaintiff was entitled to recover possession of the rings. The court said: "The principle on which this case must be decided, and the distinction which must be drawn between this case and Bridges v. Hawkesworth [note (11) above] is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41: 'The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of

(12) 90 Pa. 377.

(13) (1896) 2 Q. B. Div. 44.

the thing's existence. . . . It is free to anyone who requires a specific intention as part of a de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorized interference.' That is the ground on which I prefer to base my judgment." And the court distinguished the case from those in which the thing was cast into a public place, into a place, in fact, of which it could not be said anyone had a real de facto possession, or a general power and intent to exclude unauthorized interference. The case of Bridges v. Hawkesworth was said to stand by itself and on special grounds and on those grounds the case was approved of.

It is submitted that South Staffordshire Water Company v. Sharman is right, and, on the principle upon which it rests, that the case of Durfee v. Jones is wrong. In the latter case the owner of the safe had had exclusive possession and control of it with the intent to exclude unauthorized interference and, therefore, possession of the money in the safe, notwithstanding his lack of knowledge that the money was there.

However, the doctrine of South Staffordshire Water Company v. Sharman has not passed unchallenged. In Danielson v. Roberts (14) the plaintiffs while working for defendants on the latter's premises, found an old tin vessel containing seven thousand dollars in gold coin. It was held that the money had been lost and that the plaintiffs were entitled to it, the court saying: "The fact

(14) 44 Ore. 108.

that the money was found on the premises of the defendants, or that the plaintiffs were in their service at the time, can in no way affect the plaintiffs' right to possession." No more was said on that point and it does not seem to have received the attention due to it.

The conclusion to be derived from the foregoing cases is that by the English law the owner of the place where the thing is found has possession of the thing, if the place is not a public one and if he has exercised dominion and control over it with the intent to exclude unauthorized interference, and that this is so although he does not know the thing is there; but that the American cases, so far as dealing with the point, treat such lack of knowledge as preventing the owner from getting possession of the lost property.

§ 88. **Distinction between property lost and deposited.** In all the foregoing cases the property had been lost in the true sense of the word. A distinction is made between such cases and those of finding property deposited intentionally in the place where found.

In McAvoy v. Medina (15) the plaintiff, being in the shop of the defendant, a barber, as a customer, found a pocket book on the table. It was agreed that it had been placed on the table by a transient customer of the defendant and accidently left there. It was held that the defendant was entitled to the possession of it. The property had not been lost at all, but intentionally left there. It was regarded as having been put in the custody and possession of the defendant.

(15) 11 Allen (Mass.) 548.

So, in Ferguson v. Ray (16) where a lessee of land in possession found gold bearing quartz, buried in the land, under conditions indicating it had been purposely placed there, it was held to belong to the owner of the land and not to the lessee who found it. The decision was put upon the ground that the property was not really lost.

§ 89. **Rights of trespasser.** A trespasser is not entitled to articles found by him on premises where he is a trespasser. Where a stick of timber was thrown by the sea on plaintiff's land, and the defendant entered and carried it away, it was held that, as the defendant was a trespasser, the plaintiff had the better right to the possession of the timber (17).

§ 90. **Statutory regulation.** The rights and duties of finders are often regulated by statute, which sometimes requires certain advertising of the property as a condition of the finder's title being valid.

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(16) 44 Ore. 557.

(17) Barker v. Bates, 13 Pick. 255 (Mass.).

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PATENT LAW

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CHAPTER I.

ORIGIN AND NATURE.

§ 1. **No common law right.** No inventor has any special right in his invention, as such, at common law (1). If he cannot guard his invention from the public by secrecy, the only rights he has are those which are secured to him by statutes, upon his compliance with their terms. No action will lie by an inventor to prevent any person from

(1) Brown v. Duchesne, 19 How. 195.

practicing freely an unpatented invention, unless such person has been guilty of fraud or breach of trust in securing knowledge of the invention, or some other such special ground exists.

§ 2. **Origin of patents: In England.** In England, in the middle ages, the monarchs occasionally created, by royal patent or grant, monopolies, giving to certain individuals the exclusive right to carry on particular trades. These monopolies were bestowed upon the grantees generally as marks of royal favor, or as a reward for services, but were not based upon any considerations of invention or discovery with respect to the subject matter of the monopoly. They did not in any manner tend to promote the progress of science and useful arts, and finally became so oppressive that in 1623, an act (2) was passed, prohibiting monopolies in general, but excepting "Letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures . . . . to the true and first inventor and inventors . . . . so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient" (3).

The English patent law rests upon the exception in this early statute.

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(2) 21 James I, c. 3.

(3) The last clause of this section, relating to public oppression, is retained in substance in many of the present patent statutes of the different countries, which provide that the patented device must be manufactured, during the life of the patent, in such manner that it may be obtained by the public at a reasonable price. There is, however, no such provision in the patent laws of the United States.

§ 3. **Same: In United States.** The patent laws of the United States rest upon the constitutional provision (4), giving to Congress power "to promote the progress of science and useful arts, by securing for limited times to . . . . inventors the exclusive right to their respective . . . . discoveries;" and upon the acts of Congress passed in pursuance of this provision.

§ 4. **Nature of patents.** A United States patent is a grant to the patentee, for the term of seventeen years, of the exclusive right to make, use, and vend his invention throughout the United States and the territories thereof (5). Such a grant of an exclusive right is property, and the owner of a patent is protected by law in its enjoyment the same as the owner of any other species of property (6). Likewise, patents may be sold or assigned, in whole or in part, or otherwise freely dealt in; they may be made the subject of contracts relating to the making, using, or selling of devices embraced within their terms; and upon the death of the patentee, they pass to his personal representatives.

§ 5. **Justified under public policy.** Under our patent laws, as sanctioned by the Constitution, the courts have always recognized that a patent is in no sense merely an oppressive monopoly, but is a reward to the inventor for his efforts in bringing about the invention, and for making it public; a stimulus to him and to others to strive further in the inventive field. He receives nothing from the government, or from the people, which is in any sense

(4) U. S. Const., Art. I, § 8.

(5) U. S. R. S., Sec. 4884.

(6) McCormick Mach. Co. v. Aultman, 169 U. S. 609.

a loss to them. He is simply allowed to retain a part of what he gives to the public—to retain as his own, for a limited time, that which he otherwise freely dedicates to the public. In an early case it was said that the exclusive right which a patentee receives is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects" (7).

Patents are therefore fully justified under public policy.

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(7) Kendall v. Winsor, 21 How. 322.

CHAPTER II.

SUBJECTS OF PATENTS.

§ 6. **Defined by statute.** Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, may, under certain conditions, and upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor (1). As all of our patents are granted under the section of the patent laws which enumerates the subjects above mentioned, and none others, these are the only subjects upon which patents can be granted.

§ 7. **Meaning of art.** The word *art,* as used in the patent act, is practically synonymous with *process,* which has been defined as "a mode of treatment of certain materials to produce a given result; an act or series of acts performed on a subject-matter to be transformed and reduced to a different state or thing" (2). Examples of what are conceded to be *arts* in the patentable sense are the art of printing, the art of photography, and the art of telegraphy.

§ 8. **Meaning of machine.** The word *machine,* as used in the patent act, means a combination of mechanical elements adapted to perform a mechanical function (3). It

(1) U. S. R. S., Sec. 4886.
(2) Cochrane v. Deener, 94 U. S. 780.
(3) Corning v. Burden, 15 How. 252.

includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. A machine is said to have a rule of action of its own.

Inventions pertaining to machines may be divided into four principal classes (4), viz:

1. Those where the invention embraces the entire machine.

2. Those where the invention embraces one or more of the elements of the machine, but not the entire machine.

3. Those where the invention embraces both a new element and a new combination of elements previously known.

4. Those where the invention embraces a new combination of old elements, producing a new result.

At this late day, inventions of the first class are extremely rare, as it seldom happens that an inventor produces a machine which is new in its entirety. Occasionally, however, such an invention is patented, as, for example, a recent patent (5) covers a machine for transferring pollen from plant to plant, thereby assisting nature in its work of fecundation, or fertilization. The first claim of this patent reads—"A machine for distributing pollen from bloom to bloom in order to fecundate the seeds thereof." In other words, the patent covers all machines for distributing pollen in such manner and for such purpose, and if this claim is valid, all such machines would infringe it. It may be said by way of anticipation

(4) Union Sugar Refinery v. Matthiesson, 3 Cliff. 639.

(5) Pat. No. 926690, 143 O. G. 1316.

that an inventor is required, in his application for a patent, to particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. In the case here cited, the applicant was allowed to claim his invention in the words above.

Inventions of the other three classes are more common, as, for an example of the second class, in a machine for making paper bags, the invention may lie in the production of a peculiarly shaped knife, adapted to cut from a roll of paper, by one cut, a blank of a peculiar shape (6); or an improved model of a typewriter, having its parts rearranged into a new combination, and having one or more new elements added, such as a second ribbon, or a special key of some sort, may constitute an invention of the third class.

Machines of the fourth class are in fact only improvements of machines previously known, and will be discussed more fully under the head of improvements in § 12, below.

The great majority of all patents issued have been machine patents.

§ 9. **Distinction between art and machine.** It is sometimes important to note that there is a distinction between an *art* in the patentable sense, and the other subjects of patents, as one inventor may perhaps discover a certain art or process, and obtain a valid patent therefor, and another inventor, or other inventors, may invent or patent *machines* for carrying on the process; or the same person

(6) Union Paper Bag Mach. Co. v. Pultz & Walkley Co., Fed. Cas. No. 14392.

may discover or invent the former, and also the latter, and may obtain valid patents for both (7). In the first case, the patentee of the process, if he can carry on his process without using the other's machine, may do so without infringing; while the patentee of the machine may not use his machine to carry on the patented process —although he may use it for other purposes if he cares to.

§ 10. **Manufacture.** The word *manufacture* is used in the Patent Act in a very broad sense, and has been generally held to be synonymous with *product* (7). It may be said to include everything that is made by the art or industry of man, that is not a machine, a composition of matter, or a design. Examples are manufactured articles of merchandise generally, such as baskets, pottery, articles of clothing, nails, screws, etc.

§ 11. **Composition of matter.** A composition of matter may be defined in general as a compound of two or more substances which possess a property or quality that is not possessed by the substances individually.

§ 12. **Improvements.** An *improvement* may be said to be the addition of some useful thing, or of some useful quality or property to an art, machine, manufacture, or composition of matter. Practically all patents which are now being, or for some time past have been issued, belong to this class. It is said that "there is nothing new under the sun," and this maxim is as true in the inventive field as anywhere else. But this is far from saying that invention is not productive. Everywhere, in the technical field, arts, processes, methods, and modes are being improved;

(7) Morse and Bain Tel. Case, Fed. Cas. No. 9861.

practically every machine in common use to-day is being constantly improved; all of our tools, implements, articles of merchandise, and other articles of manufacture, and chemical compounds and compositions, and other compositions of matter, are from time to time improved; and patents are granted by the government each week for such improvements (8).

§ 13. **Meaning of invented or discovered.** Nothing is patentable unless there is in some manner included therein, the element of invention. As used in the Constitution and patent laws, *discovered* is synonymous with *invented;* and no discovery will entitle the discoverer to a patent which does not amount to the contrivance or production of something which did not exist before (9). The "discoveries" of inventors are inventions. The same man may invent a machine and may discover an island or a law of nature. The first involves invention and is patentable—the second is not.

The four classes of things above enumerated as the subjects of patents are not such as can be made known by discovery, as a river or an island may be. They must be created (9), and their creation for the first time generally involves invention. They are ordinarily products of the inventor's creative faculty—of his inventive genius—

(8) At the present writing, there have been granted by the United States nearly one million patents, the last patent appearing in the Official Gazette of the Patent Office for June 29, 1909, being No. 926719. A rough average taken of the number of patents reported in a number of issues of the Official Gazette, selected at random for some time back, seems to show that they are being issued at the rate of about 700 to 800 each week.

(9) In re Kemper, Fed. Cas., No. 7687.

and as such, are patentable. Likewise, an improvement of any one of such four classes of things, if it involves the element of invention, is patentable.

But in all such cases, there must actually have been invention. The product must have been the result of the exercise of the inventive faculties. While this much is clear, on the decisions construing the statute, it is equally clear that no precise rule can be laid down for determining, in all cases, what amounts to invention, and what does not, and reasonable minds may easily differ on the question. In an opinion by the Supreme Court, it was said, "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition" (10).

§ 14. **What is not invention.** It is not an invention to produce a device which any skilful mechanic could produce whenever required. In a leading case, holding a patent for such a device void, the Supreme Court has said:

(10) McClain v. Ortmayer, 141 U. S. 427.

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. . . . To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.

The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge, and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing waves of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith" (11).

(11) Atlantic Works v. Brady, 107 U. S. 199.

Thus, merely broadening the flange of a mail bag and increasing the number of rivets used in attaching it to the bag, does not constitute invention (12); nor making the base of a brass or other soft metal cartridge of steel or other hard metal so that it can be used for repeated discharges without injury to the vent hole in its center (13); nor forming the points of a staple by cutting diagonally from the same side of each leg, for the purpose of causing both points to bend in the same direction when the staple is driven, staples having been previously made with diagonal cuts from the outside of each leg for the purpose of causing the points to come together (14); nor placing a box over a sewing machine when not in use to protect it from dust (15); nor applying a screw to the cogs in the periphery of a quadrant on a rudder head, for the purpose of moving and holding the rudder in its various positions (16); nor securing the door of a time lock with a key, and providing such door with an aperture through which the clock can be wound (17); nor weighting the knife bar of a roll-paper cutter, so as to obviate the necessity of pressing it down by hand when cutting off a sheet of paper (18); nor placing two sheets of fly paper together with their sticky surfaces face to face, for convenience in packing and handling, etc. (19); nor

(12) Thomson v. U. S., 27 Ct. Cl. 61.
(13) In re Maynard, Fed. Cas. No. 9352.
(14) Double-Pointed Tack Co. v. Two Rivers Mfg. Co., 109 U. S. 117.
(15) Ross v. Wolfinger, Fed. Cas. No 12081.
(16) Cochrane v. Waterman, Fed. Cas. No. 2929.
(17) Yale Lock Mfg. Co. v. Norwich Natl. Bank, 6 Fed. 377.
(18) Am. Roll Paper Co. v. Weston, 59 Fed. 147.
(19) Andrews v. Thum, 67 Fed. 911.

lengthening the legs of a stove to allow of a lamp being placed under it (20).

In general, it may be said also, that there is no patentable invention in merely changing the form of a machine (unless a particular form is necessary as the means for accomplishing a particular effect), or of some unessential parts, or in using known equivalent powers, not essentially varying the machine or its mode of operation or organization—for example, changing the angularity of two shafts which are operatively connected by gearing, and substituting one form of gearing for another, as spur gears for bevel gears, or vice versa; nor in changing the location or position of parts (unless such change brings into existence a *new combination* of devices, operating by reason of such new combination to produce a *new* and useful *result)*—for example, rearranging certain devices upon a lantern, by means of which it could be separated and the globe taken out from above instead of from below, was not invention (21); nor was changing the position of the raker's seat upon a harvester so that the raker could face the falling grain (22). There is ordinarily no invention in a substitution of materials, as one metal for another, or porcelain for glass, or rubber for wood. But if such substitution effects a new mode of operation of the device or machine, or produces a new and useful result which is different in kind, and not merely in degree, from the result produced by the old material, such substitution is patentable—as where wooden blocks, resting in oil re-

(20) Couse v. Johnson, Fed. Cas. No. 3288.

(21) Dane v. Ill. Mfg. Co., Fed. Cas. No. 3558.

(22) Kirby v. Beardsley, Fed. Cas. No. 783

ceptacles, were substituted for iron blocks for supporting the rim of a saw carriage. The wooden blocks, by capillarity, supplied oil to the bearing surfaces, whereas, in the case of the iron blocks, it was necessary to supply oil by an independent means (23).

§ 15. **Mechanical equivalents.** Two devices which perform the same function in substantially the same way, and accomplish substantially the same result, are known in the patent law as *mechanical equivalents* (24). Familiar examples are: a crank, and an eccentric or a cam, when used to transmit rotary into reciprocal rectilinear motion; a chain and sprockets, and a shaft and pairs of bevel gears; a weight and a spring, for many purposes; and a rotative screw and non-rotative nut, and a non-rotative screw and rotative nut, for the purpose of imparting endwise movement to the screw; it is not invention to substitute one of these for another (25).

But, in a case where the prior art showed a fly-book for anglers' fly-hooks, consisting of a page with catches at one margin to hold the hooks, and a series of overlapping flat springs at the opposite margin for holding the snells, it was held invention to substitute for the flat springs, a coiled spring, between the convolutions of which the snells could be held (26), the court saying, in effect, that for such purpose the coiled spring possessed properties which the flat springs did not possess, and that

(23) Perkins v. Interior Lumber Co., 51 Fed. 286, at 291.

(24) Union, etc. Co. v. Murphy, 97 U. S. 120. See also § 50, below.

(25) Crouch v. Roemer, 103 U. S. 797.

(26) Bray v. U. S. Net & Twine Co., 70 Fed. 1006.

as so used, the former was not the mechanical equivalent of the latter.

§ 16. **Combination and aggregation.** It is commonly said that a combination is patentable, and an aggregation of parts is not, but, as in other cases involving the question of invention, or lack of invention, no precise rule can be laid down for distinguishing these two things under all sets of facts. It has been said, however, that in a patentable combination, the elements must contribute to a new mode of operation, or produce a new and common result; and that a "combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements" (27).

In the case from which this quotation is taken, a leading case in the Supreme Court, it was held that a lead-pencil, provided at one end with a rubber eraser, did not constitute a patentable combination. Continuing, the court said: "An instance and an illustration are found in the discovery that, by the use of sulphur mixed with india-rubber, the rubber could be vulcanized, and that without this agent, the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different from that before in use. Another illustration may be found in the frame in a saw-mill which advances the log regularly to meet the saw, and the saw which saws the log; the two co-operate and are simulta-

(27) Reckendorfer v. Faber, 92 U. S. 347, 357.

neous in their joint action of sawing through the whole log; or in the sewing machine, where one part advances the cloth, and another part forms the stitches, the action being simultaneous in carrying on a continuous sewing. A stem-winding watch key is another instance. The office of the stem is to hold the watch, or hang the chain to the watch; the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced, or a double duty performed by the combined result. In these and numerous like cases the parts co-operate in producing the final effect, sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each, and is therefore patentable."

Two other cases may serve to illustrate how close to the dividing line between patentable combination and aggregation two cases may approach, and still be distinguishable. In Hailes v. Van Wormer (28), the patentee had brought together, in a base-burning stove, which was well-known at the time, several elements, each of them individually, admittedly old, but all of them combined for the first time in a stove of that sort, and all of them contributing, as it was claimed, to the common result of producing a stove which was an improvement over all stoves of that kind theretofore used. These elements were—a certain kind of fire-pot; a certain kind of fuel reservoir above it; a revertible flue outside of the fire-pot; a di-

(28) 20 Wall. 353.

rect draft of a particular sort; and mica-covered openings in the casing of the stove. The object which the patentee sought to accomplish by combining these elements, and his reason for selecting each one, were fully explained in his specification as set out in the opinion. Nevertheless, the court, in denying validity to his patent, said: "It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination."

In Williams v. The Rome, etc. R. R. Co. (29), the court passed upon the validity of a patent wherein the patentee had produced, as it appeared, the first successful kero-

(29) 15 Blatch. 200.

sene-burning locomotive headlight, his invention consisting in the bringing together of several old elements, namely: a circular wick tube, perforated air screens to regulate the passage of air to the interior and exterior of the flame, a cap deflector above the wick, a certain kind of oil reservoir, a flame-spreading device above the cap deflector, a certain kind of wick-holding device, and a certain kind of chimney-supporting device. In holding the patent valid, the court, after commenting on Reckendorfer v. Faber and Hailes v. Van Wormer, and the doctrines there announced, said: "These doctrines are not applicable to the present case. The flame of the lamp and its illuminating character, as to brilliancy, steadiness, size, and position, is the result to which all the devices used contribute. They all co-operate to effect and modify such illuminating character of the flame of the lamp. A locomotive head-light must be large, brilliant, steady, easy of adjustment as to the position of its wick, concentrated as nearly as possible in the focus of the reflector, and supplied freely with oil without interfering with the projection of the light forward, and without pumping mechanism." The opinion then points out how each of the devices embodied in the lamp contributes toward the illuminating character of the flame—and on this ground the cases are distinguishable (30).

The rule derived from these three cases may be stated with substantial accuracy in the words of Justice Curtis, in a circuit court case (31), wherein it was also held that

(30) A full discussion of these three cases is found in Merwin, Patentab. Inven. and Renwick, Patentabl. Inven.

(31) Forbush v. Cook, 2 Fisher, 669.

all the elements of a valid combination need not act simultaneously, but may act successively. He said: "To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made." Later cases are in accord with this doctrine.

§ 17. **What is invention.** If there has been an exercise of the inventive faculty, it is immaterial how small may have been the actual effort involved—how easily, or how quickly the idea may have come to the inventor, or whether the invention was the result of deliberation, conscious or unconscious, or of intuition, or of any other exercise of the reasoning faculty. The courts have properly refrained from trying to analyze the inventor's mental processes in any particular case, and have determined that the presence or absence of invention is shown by the *result,* when viewed in the light of such rules of decision as they have been able to apply. Thus, there is invention in constructing a footboard for a row boat, with the point turned up at an angle with the body of the board, in order to better accommodate the rower's foot, the same effect having previously been accomplished by stuffing rags under the rower's toe (32); or in combining a sheet of

(32) Davis v. Parkman, 45 Fed. 693.

celluloid with an interlining of cloth to render it suitable for collars and cuffs (33); or in filling the interstices of a corn-cob pipe from the outside with cement (34).

§ 18. **Novelty.** Any person who has made an invention which is new and useful, and which was not known or used by others in this country before his invention; or patented or described in a printed publication in this or any foreign country before his invention; or patented or described in a printed publication in this or any foreign country for more than two years prior to his application for a patent; or in public use or on sale in this country for more than two years prior to his application for a patent; and which has not been abandoned, may obtain a patent for his invention (35).

The word *new* has a somewhat broader meaning in the patent statutes than it has in the dictionaries, and everything which is actually new in the commercial sense (and a few things more), is new in the patentable sense.

The same considerations which apply in determining the question of invention often apply also in large part in determining the question of novelty; and the courts occasionally use the two terms synonymously, although they are different. Thus, in Hailes v. Van Wormer (36), where invention was denied on the ground that there was not a patentable combination, but merely an aggregation of old elements, the alleged invention is also said to lack novelty, by which is meant that there was no novelty in

(33) Celluloid Mfg. Co. v. Am. Zylonite Co., 35 Fed. 417.

(34) H. Tibbe etc. Co. v. Heineken, 43 Fed. 75.

(35) U. S. R. S., Sec. 4886.

(36) Note (28) above.

any of the elements, and that there was no invention in combining them.

And in many cases where an inventor produces one thing, and the prior art shows another thing very similar to it, it may be said with substantial accuracy, either that his device shows no invention, in view of the prior art (meaning that there was no invention involved in producing something so nearly like that which existed before); or that his invention lacks novelty (meaning that he has not produced anything which did not exist before). Such cases are Brown v. Piper (37), where the patentee applied the principle of an ice-cream freezer, at that time well known, to an apparatus for the preservation of fish; and Atlantic Works v. Brady (38), where it appeared that steam boats had been backed into mud banks, in order to utilize their propellers for the purpose of dredging, and the patentee produced a dredge-boat having a dredging screw at its bow. In both of these cases the patents were held invalid.

It is no answer to the objection of lack of novelty that the inventor did not know of the anticipating device, or devices, as he is presumed to have knowledge of everything which has been known or used by others in this country, or which has been patented or described in a printed publication in any country.

§ 19. **Utility.** An invention to be patentable must be useful (39). By useful is meant that the invention may be applied to a beneficial use in society, in contradistinc-

(37) 91 U. S. 37.

(38) 107 U. S. 192.

(39) U. S. Const., Art. 1, Sec. 8, § 8; U. S. R. S., Sec. 4886.

tion to one which is injurious to good morals, or to the good order of society, or is frivolous, or is a mere contrivance without any other merit than novelty (40).

A device is not useful, which cannot be used for the purpose for which it was intended, or which does not accomplish the result which it was intended to accomplish—as where the grounded end of a lightning rod was surrounded with plates of dissimilar materials, in order to form a galvanic battery which was intended to charge the upper end of the rod with electricity of a kind opposite to that in the air for the purpose of facilitating the discharge thereof, it was held that since the galvanic charge was necessarily so weak in comparison with the atmospheric charge as to have no appreciable effect upon the latter, the invention was without utility.

A device lacks utility which is used only for an immoral purpose, as a gambling device (41). But a device which has a legitimate purpose is not denied patentability, although it is sometimes used for an illegal purpose, as for example, a pack of playing cards (42); or a revolver or other weapon.

Ordinarily the degree of utility is unimportant in determining whether or not a device is patentable. If the device is not frivolous or prejudicial to the public, and has any degree of usefulness, no matter how slight the practical utility, it is considered useful and may be patented (43). And in general it may be said that in the Pat-

(40) Bedford v. Hunt, Fed. Cas. No. 1217; Thompson v. Haight, Fed. Cas. No. 13957.

(41) National Automatic Device Co. v. Lloyd, 40 Fed. 89.

(42) Pat. No. 927119, S. A. Cohen, 144 O. G. 142.

(43) Ex parte Sanche, 80 O. G. 185.

ent Office doubts are resolved in favor of the utility of a device. On this ground many patents are now being issued on flying-machines, it being sufficient if they have theoretical utility, although doubtless further experiment will show many of them to be impractical (44). But the Patent Office has always refused to grant patents on perpetual motion machines (45).

§ 20. **Abandonment.** An inventor is not entitled to a patent if he has abandoned his invention to the public. By abandonment of invention in this sense is meant that the inventor, having fully performed his inventive act, and having embodied his idea in tangible materials ready for immediate public use, freely gives it to the public without intending to claim from them the protection to which he is entitled (46). But merely abandoning unsuccessful experiments which stop short of becoming a complete invention does not prejudice his rights (47), and he may afterwards resume his work, carry his invention to completion, and obtain a patent therefor.

The kind of abandonment which defeats an inventor's right to a patent is a question of fact, and in general it may be said that any act which places the invention within reach of the public, unaccompanied by indications that the inventor claims his rightful privilege, amounts

(44) But all patents on the latter will be open to defeat afterwards in the courts by showing such fact. See § 61, below.

(45) The Patent Office has a printed form letter for answering all applications for patents on such machines. In each case the applicant is required to furnish a full size working model of his invention.

(46) 1 Robinson on Pats., p. 473.

(47) Walker on Pats., § 86; 22 Am. & Eng. Ency. Law, 2nd. ed. 341.

to an abandonment (48). But in all cases the question is one of intention, actual or constructive, and abandonment is shown only by such conduct as clearly indicates the inventor's intention to surrender his rights.

It will also defeat an inventor's right to a patent if his invention has been patented or described in any printed publication, or has been in public use or on sale in this country, more than two years prior to his application for a patent. Where one of these things has occurred it is of course unnecessary to consider any question of his knowledge or intent, as the statute makes them a complete bar to his right. But it will not defeat his right to a patent in this country if the invention has been patented to him or his legal representatives or assigns in a foreign country, unless the application for such foreign patent was filed more than twelve months before the filing of his application in this country (49).

§ 21. **What is not patentable.** The discovery of a principle or law of nature, sometimes also called a scientific principle, or a scientific fact, is not patentable. For example, in one case (50) it appeared that the purported inventor had discovered that blocks of ice placed on edge, owing to the peculiar action of air currents within the ice, melted less rapidly than when laid flat, and claimed a patent for such discovery; and in another case (51) it appeared to have been known that the old process of fumi-

(48) 1 Robinson on Pats., 475.
(49) U. S. R. S., Secs. 4886-7.
(50) In re Kemper, Fed. Cas. 7687.
(51) Wall v. Leck, 66 Fed. 552.

gating plants and trees by hydrocyanic acid gas, after covering them with an oiled tent, was more effective in the absence of the actinic rays of the sun, and it was sought to patent the process of carrying on such operations at night, or in foggy or cloudy weather. In both of these cases the patents were held invalid, as was also in another case a patent for the discovery that the inhalation of ether by an animal, i. e. an old agent acting by an old means upon an old subject, produced insensibility to pain. And in O'Reilly v. Morse (52), it appeared that Samuel F. B. Morse, in his eighth claim, as it was construed by the Supreme Court, claimed the use of an electric current for marking intelligible signs at a distance. This claim was held invalid.

The rule derived from these cases, and others cited by Mr. Walker in his work on Patents (53), is, as explained by him, that whereas a patent for a process is a patent for the described combined use of *all the laws of nature* utilized by that process, in the cases above mentioned it was sought, in each instance, to patent *only one of such laws.* If this could be done, a patent so obtained would be much broader than an ordinary process patent, for it would include every process which accomplished the same result as the one covered by the patent, and which utilized that particular law of nature, whether in combination with other laws or not; and the patentee could, by claiming one law of nature which might be essential to the operation of all such processes, suppress, during the life of his patent, all further invention in that field.

(52) 15 Howard, 112.

(53) Walker on Pats., Sec. 7 ff.

On the other hand, a process patent covers only the combination of all laws of nature which are utilized in the process, and the particular manner or method of using them, leaving other inventors free to use the same laws in combination with other laws, or in other combinations and methods. Such patents are valid, as for example in Mowry v. Whitney (54), where the patent related to the process of manufacturing cast iron car wheels by retarding their cooling through heating a second time; and in McClurg v. Kingsland (55), where the patent covered a method of casting chilled rollers, and other cylinders, by giving the tubes or gates through which the melted metal entered the mold a tangential inclination, so that the metal would receive a rotating motion in the mold and by centrifugal force cause the purer and heavier metal to move toward the circumference of the mold, leaving the dross in the centre. In both of these cases, the patented processes depended for their operation upon well known laws of nature; in the first case, upon the laws of contraction and expansion of solids with changes of temperature, of the hardening of iron in different degrees of hardness, toughness and brittleness, with different rates of cooling, and upon the fact, which the inventor discovered, that hardness once given the iron by rapid cooling, will not be seriously impaired by its immediate re-heating and subsequent slow cooling. The patent related to the *particular method* of utilizing *all* of these laws of nature, and was sustained. In the second case, the patented process

(54) 14 Wall. 620.

(55) 1 How. 202.

of course utilized the well-known law of centrifugal force, but the patentee claimed only the particular method of carrying on his process in such manner as to bring that force into operation, and the patent was likewise sustained (56).

§ 22. **Designs.** In addition to the subjects of patents above numerated, there are also allowed by Section 4929 of the Revised Statutes, patents to every person who has invented "any new, original, and ornamental design for an article of manufacture" (57). Many of the considerations which apply in determining the patentability of inventions of the classes hereinbefore enumerated, apply with equal force in determining the patentability of designs, but instead of the requirement that the invention must be "new and *useful*," found in Section 4886, Section 4929 provides that it must be "new, *original, and ornamental.*"

The question of novelty is determined by the similarity or dissimilarity of two designs from the point of view, not of the expert, but of the ordinary observer with that

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(56) These two cases, and several more, are cited and explained in an instructive paper on Process Patents read by Mr. C. Clarence Poole, of the Chicago Bar, before the Patent Law Association of Chicago, June 10, 1895.

(57) Subject to the same provisions with respect to prior knowledge and use, patenting, description in printed publication, and abandonment as in the case of patents for arts, machines, manufactures and compositions of matter (U. S. R. S., Sec. 4929), except that the inventor must not have allowed his design to be patented in a foreign country on an application filed more than four months (instead of twelve months, as in the case of the other subjects of patents,) before the filing of his application in this country. U. S. R. S., Sec. 4887.

degree of observation which men of ordinary intelligence give to the subject matter (58). Novelty of a design is not negatived by the fact that every separate feature thereof is found in one or another of a number of prior designs, if all of such prior designs considered together do not suggest the new design to one who had not seen it before (59). Otherwise novelty would be denied to many modern designs which utilize classic forms of ornamentation.

Patents for designs are granted for the term of three years and six months, or for seven years, or for fourteen years, as the applicant may, in his application elect (60), the government fees for issuing such patents being graded accordingly.

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(58) Gorham Mfg. Co. v. White, 14 Wall, 511; Monroe v. Anderson, 58 Fed. 398.

(59) Untermeyer v. Freund, 37 Fed. 342, 344.

(60) U. S. R. S., Sec. 4931.

CHAPTER III.

PROCEEDINGS IN PATENT OFFICE.

§ 23. **Who may apply.** Any person who has made an invention, subject to the limitations above considered, may apply for a patent therefor (1). In case of the death or insanity of the inventor, the application may be made by and the patent will issue to his duly authorized representative; or in case of his death or insanity during the proceedings in the Patent Office, such representative may intervene (2).

Where a complete invention is the gradual result of the combined mental operations of two or more persons working together, or where each party invents or discovers something essential to the whole (3), as where an idea is suggested to one and he constructs a machine embodying his idea, but it is not a completed and working machine, and another takes hold of it, and by their joint labors, one suggesting one thing, and the other another, a perfect machine is made, such parties are said to be joint inventors (4). Joint inventors are entitled to and should apply for a joint patent; neither of them alone is entitled to a patent for their joint invention. But independent inventors of distinct and independent improve-

(1) U. S. R. S., Sec. 4886.
(2) Rules of Prac., U. S. Pat. Off., Rule 25.
(3) 22 Am. & Eng. Ency. Law, (2nd. ed), 351, and cases cited.
(4) Worden v. Fisher, 11 Fed. 505.

ments in the same machine can not obtain a joint patent for their separate inventions; and where one furnishes the capital and another makes the invention (5); or where a mere suggestion is made by one and not acted on by him, but is carried out and perfected by another (6); such persons are not joint inventors.

An inventor may assign to another his unpatented invention, or his inchoate right to obtain a patent, but in any such case of assignment, in whole or in part, it is nevertheless his sole invention and the application must be signed by him (7); although, upon request of the applicant, the patent may issue to the assignee, or to the inventor and assignee jointly, as the case may be (8).

§ 24. **Applications.** All proceedings for obtaining patents are begun by application to the Commissioner of Patents. Such application must be in writing, and signed by the inventor (9). A complete application comprises a first fee of fifteen dollars (9a), a petition addressed to the Commissioner, a specification of the invention, an oath as to certain facts; and a drawing, model, or specimen when required (10). An application will not be

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(5) Rules Prac. U. S. Pat. Off., Rule 28.

(6) Worden v. Fisher, above.

(7) Or in case of his death, by his executor or administrator. (Above.)

(8) U. S. R. S., Sec. 4895.

(9) Or inventors in the case of a joint invention; or by his or their representatives in case of death or insanity. (Above.)

(9a) Except in applications for *designs*, where the fees vary according to the term desired.

(10) Rule 30.

placed upon the files for examination until all of its parts, except the model or specimen, are received.

§ 25. **The petition.** The petition must state the name, residence, and postoffice address of the petitioner, must contain other matters of a formal nature, and must be signed by the petitioner. It is the general practice for applicants and their attorneys to follow the printed form of petition furnished by the Patent Office (11).

§ 26. **The specification.** The specification is a written description of the invention or discovery and of the manner and process of making, constructing, compounding, and using the same, and is required to be in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which the invention or discovery appertains, or with which it is most nearly connected, to make, construct, compound, and use the same (12).

The requirement of a *full, clear, concise,* and *exact* disclosure is one of the fundamental principles of our patent law, as such disclosure is the consideration which the public receives for the limited protection which it grants. It is the theory of the patent law that after the period of protection has expired, the public shall be able to practice the invention freely. As patents are occasionally defeated in the courts on the ground that the inventor has not made a sufficient disclosure of his invention, to enable any person "skilled in the art or science" to understand it, it is

(11) The Rules of Practice of the U. S. Patent Office, containing this form and many others ordinarily used, are published by the Patent Office for gratuitous distribution.

(12) U. S. R. S., Sec. 4888.

the practice of all conscientious solicitors to give their most careful attention toward making their specifications so full and complete that *all* intelligent persons may understand them, whether skilled in the art or science, or not.

The specification must set forth the precise invention for which a patent is solicited, and, in the case of a machine, the applicant must explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions (13). But this requirement that the applicant explain the principle of his machine has been liberally construed in order not to invalidate the patents in many cases where the inventor has not correctly understood the principle of his machine when applying for a patent, but has otherwise given a full, clear, concise and exact description of it (14); and the last requirement above stated has been held to mean that he shall state the mode of applying that principle, which he contemplates to be the best (15).

The specification should refer to the drawing, in all cases where a drawing is filed (15a), and should describe fully all the figures shown therein.

§ 27. **The specification (continued): The claims.** The applicant must also in his specifications "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery"

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(13) U. S. R. S., Sec. 4888.

(14) Emerson Co. v. Nimrocks, 99 Fed. 739; Natl. Meter Co. v. Thompson Meter Co., 106 Fed. 538.

(15) Walker, Pats., Sec. 115.

(15a) See § 30, below.

(16). A skilful compliance with this last requirement is perhaps the most important part of an applicant's or his solicitor's entire work of applying for a patent, for it is the breadth of his claim (limited always to his invention as distinguished from the prior art), as presented by him and allowed by the Patent Office, that determines the scope of his patent as regards the question of infringement by other devices, processes, or compositions. A claim covering, in terms, more than the inventor has invented is void, and a claim covering less is of course needlessly narrow—anything which is disclosed in the application and not claimed is deemed abandoned. Little can be said here which may prove helpful to one inexperienced in drawing claims, as this is an art in itself and applicants are expressly advised by the Patent Office to place their cases in the hands of competent solicitors (17). As the interpretation and construction of claims is governed by many technical distinctions, no rules can be given which will be in anywise complete in themselves, but a few general principles may be stated.

It is considered good practice to endeavor to obtain the allowance of at least one claim to the invention in broad terms, and to draw one or more others describing the invention in more specific terms. Then if the broad claim is afterwards invalidated by the courts on the ground of anticipation, the specific claim may stand. A good illustration of this is found in a recent patent cited for purposes of illustration hereinbefore (18).

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(16) U. S. R. S., Sec. 4888.

(17) Rule 17.

(18) § 8 above, and note (9).

The first three claims read:

1. A machine for distributing pollen from bloom to bloom in order to fecundate the seeds thereof.

2. A fecundating machine comprising a plurality of fingers adapted to gather and distribute the pollen of plants.

3. A fecundating machine comprising a plurality of fuzzy fingers adapted to gather and distribute the pollen of plants.

It will be seen that claim two is narrower than claim one by the added requirement that the machine must have "fingers," and claim three is narrower than either claim one or two by the requirement of "fuzzy fingers." If it should transpire that machines "for distributing pollen from bloom to bloom in order to fecundate the seeds thereof" were known in this country before the date of this invention, but that none of such machines had "fingers," claim one of this patent should be held invalid, but claims two and three might be sustained; or if such machines had "fingers," but not "fuzzy fingers," claims one and two should be overthrown, but claim three might be allowed to stand.

§ 28. **The claims (continued).** Where a specification describes and claims an entire machine, separate claims should also be drawn to as many separate parts, and as many separate combinations of parts of the machine as are the subjects of independent inventions. In such case, on the same reasoning as above, a claim to some essential part or combination of parts of the machine may be subsequently sustained by the courts, while the other claims are defeated. For example, in Howe's

early sewing machine patent, one of his claims was drawn to "a needle with the eye near the point" (19), which is an essential part of all sewing machines, although many different forms of mechanism have been employed to operate it. During the life of his patent Howe could prevent all persons from using such a needle in any kind of a sewing machine, whether other parts of the machine were similar to his or not.

Where some of the parts of a combination operate to impart movement to other parts, it is customary to refer to the former by such general terms as *means, mechanism,* or *devices,* for imparting such movement. These terms will not be construed to cover all possible *means, mechanism,* and *devices,* but will include all such as are the *mechanical equivalents* (20) of those described.

Where the description and drawings of a machine or device show alternative forms, one or more general claims can be drawn, which, in terms, cover all the alternative forms shown; but only one of such forms can be claimed specifically. The reason for this rule is that only one invention can be claimed in a single application, and all the claims must relate to the same invention. Two or more claims drawn specifically to different structures are an admission that there are two or more inventions; but, since the whole includes all of its parts, general claims covering all of such structures and specific claims covering only one of them, are not such an admission. It is

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(19) Deering v. Winona Harvester Wks., 155 U. S. 302.

(20) Mechanical Equivalents. See § 15 above, and notes (24) and (25).

therefore advisable in such a case for the applicant to elect which one of the alternative forms he prefers, and to claim it specifically.

§ 29. Same (continued): **Functionality.** It is not proper to describe a combination of parts by its function or effect. The claims must be drawn to describe a structure, and the structure should be described positively, and not by inference (21). Thus a claim reading: "a valve which is adapted entirely to close communication between the steam chest and the tallow pipe when the engine is working steam," was held objectionable on this ground, as it is evident that the words do not describe how the valve is constructed, but only tell what it does. And in a quite recent case it was said. "It is well settled law that a patent cannot issue for a result sought to be accomplished by the inventor of a machine, but only for the mechanical means or instrumentalities by which that result is to be obtained. One cannot describe a machine which will perform a certain function and then claim the function itself, and all other machines that may be invented by others to perform the same functions" (21a).

§ 29a. **Execution.** The specification and claims must be signed by the applicant, and attested by two witnesses (22).

§ 30. **Drawings.** In all cases where the nature of the case admits of drawings (23), the applicant must furnish

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(21) In re Thomas, 15 Gourick's Wash. Dig. 38-16.

(21a) In re Gardner, 140 O. G. 258.

(22) U. S. R. S., Sec. 4888.

(23) Probably all cases of machines, manufactures and designs, and most cases of arts.

one copy, signed by him, or by his attorney in fact, and attested by two witnesses. The drawing must show every feature of the invention covered by the claims. When the invention consists of an improvement on an old machine the drawing must exhibit, in one or more views, the invention itself, disconnected from the old structure, and also in another view so much only of the old structure as will suffice to show the connection of the invention therewith. The drawings are photo-lithographically reproduced by the Patent Office and therefore it is required that the character of each drawing be brought as nearly as possible to a uniform standard of excellence, suited to the requirements of the process and calculated to give the best results. The Office has accordingly adopted a number of rules governing the size, thickness, and quality of paper used, the color and quality of ink, character of lines, etc., all of which must be rigidly observed (24).

When the invention or discovery is of a composition of matter, the applicant, if required by the Commissioner, must also furnish specimens of ingredients and of the composition, sufficient in quantity for the purpose of experiment (25). And in all cases which admit of representation by model, the applicant, if required by the Commissioner, must furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery (26). Models must conform to several requirements as to size, material, character of construction, and so forth, laid down by the rules (27).

(24) Rule 52.

(25) U. S. R. S., Sec. 4890; Rule 62.

(26) Ibid., Sec. 4891.

(27) Rules 57, 58, and 59.

Models are very seldom required, and when not called for by the Commissioner, are not admitted (27a).

§ 31. **Oath.** The applicant is also required to make an oath, or affirmation, as to the facts, hereinbefore considered, which entitle him to a patent (28). The Rules of Practice of the Patent Office suggest a form for this oath, which is universally followed (29).

§ 32. **Actions of examiners.** Applications filed in the Patent Office are classified according to the various arts, and are taken up for examination by primary examiners in the Patent Office in regular order of filing. If the application is found in all respects proper, and none of the grounds upon which patentability is denied are found to exist, the patent is allowed and the letters issue in due course. Otherwise any one or more of such grounds may be raised, and the applicant notified thereof. As it is the ordinary practice for patent solicitors to endeavor to obtain as broad claims as possible, and as it is the duty of the Patent Office not to allow a claim broader than may be sustained under the prior art, the first action usually results in a rejection of one or more of the claims, on the ground of want of novelty. The reasons for such rejection are fully stated, and such information and references are given as may be useful in aiding the applicant to judge of the propriety of further prosecuting his application, either with or without amendment, or of abandoning the same. Ordinarily, such rejection of a claim on the ground of want of novelty, as above noted, will be upon

(27a) Rule 56.

(28) U. S. R. S., Sec. 4892, Rules of Prac., Rule 46.

(29) Form 18.

a reference to a prior United States, or foreign, patent.

§ 33. **Amendments.** The applicant may amend his application, both as to matters of form and substance, either before or after the first rejection or action; and he may amend as often as the examiner presents new references or reasons for rejection. The period during which an amendment may be made after any official action is one year (30). When an application is filed on an invention which is so far in advance of the state of the art as to make the invention of comparatively little economic value at the time, it is often the practice of skilful solicitors to delay the issuing of the patent by "hanging up" the application in the Patent Office as it is called, since the seventeen year period of protection dates from a day not later than six months after the day the patent is allowed. Such delay is brought about by refraining from making such amendments as will put the application in condition for allowance, and by taking the full period of time allowed, for each amendment. The Selden patent on automobiles (30a) was granted in 1895, on an application filed in 1879.

§ 34. **Interferences.** Whenever two or more applicants, whose applications are pending in the Patent Office at the same time, claim substantially the same invention; whenever an applicant claims to be the prior inventor of an invention for which a patent has been granted within two years before the filing of his application; and in cer-

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(30) U. S. R. S., Sec. 4894, as amended March 3, 1897. The Act of 1870 allowed two years.

(30a) No. 549160. Nov. 5, 1895.

tain other cases, an *interference* will be declared to exist between such parties, and an issue will be made up between them to determine who is the prior inventor (31). Such issue is determined by a judicial proceeding before an examiner of interferences in the Patent Office, similar in most respects to other judicial proceedings. Testimony is taken by deposition, and the cause submitted to the Patent Office by correspondence.

In the case of co-pending applications, a patent is issued in due course to the applicant to whom priority is awarded in the interference proceeding; in the case of an applicant and a prior patent, if priority is awarded to the patentee, the second application is denied, but if it is awarded to the applicant, a *second patent for the same invention* is issued to him (32). The Commissioner has no power to cancel the first patent, but it is open to defeat at any time that its validity may be afterwards contested in the courts, by showing the fact of such interference proceeding and the award of priority to another inventor.

§ 35. **Appeals and other remedies.** Appeal lies from a final adverse decision of a primary examiner, or of an examiner of interferences, in nearly all cases, to the board of examiners-in-chief, and thence successively to the Commissioner, and to the Court of Appeals for the District of Columbia (32). And whenever a patent or application is refused, either by the Commissioner of Patents, or by the Court of Appeals for the District of Columbia upon appeal from the Commissioner, the applicant

(31) U. S. R. S., Sec. 4904, Rule 93.

(32) U. S. R. S., Sec. 4909, 4910, 4911, 4912, 482.

(33) U. S. R. S., Sec. 4915.

may have remedy by bill in equity (33) in any United States Court having or acquiring jurisdiction of the parties (34); and from a decision on such a bill by one of the Circuit Courts of the United States, adverse to the complainant, after an unsuccessful appeal to the Court of Appeals for the District of Columbia from the rejection of an application by the Commissioner of Patents, an appeal lies to the Circuit Court of Appeals for the circuit in which the bill is filed; or for the District of Columbia if the bill has been filed in the Supreme Court of the District of Columbia. The Circuit Courts of Appeals are the highest tribunals to which such cases may be brought (35).

§ 36. **Allowance.** If on examination by the primary examiner, or by decision by one of the appellate tribunals above noted, it appears that an applicant is justly entitled to a patent, there is sent him a notice to such effect, calling for the payment of the final fee of twenty dollars within six months from the date of such notice, and upon payment of such fee, the patent issues in due course.

§ 37. **Form of patent.** Every patent contains a short title of the invention or discovery, indicating its nature and object, and a grant to the patentee, and his assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof (36).

The duration of a design patent may be for the term of three and a half, seven or fourteen years.

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(34) Walker on Pats., § 134.

(35) Ibid., § 144.

(36) U. S. R. S., Sec. 4884.

A copy of the specification and drawings is annexed to the patent and forms a part thereof (37).

§ 38. **Extensions, reissues and repeals.** Patents cannot be extended except by an act of Congress (38).

Whenever a patent is found to be inoperative or invalid by reason of the patentee claiming as his invention or discovery more than he had a right to claim as new, provided the error has arisen through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the patentee, or his legal representatives, or the assignees of the entire interest, may surrender the patent and obtain a reissue of the same (39). An application for a reissue is presented to the Patent office in much the same manner as an original application.

A patent may be repealed by a bill in equity brought by the United States, on the ground of fraud or mistake in its issuance; or it may be declared void in a suit in equity brought by the owner of an interfering patent (39a).

§ 39. **Caveats (39b).** A caveat is a notice given to the Patent Office of the caveator's claim as an inventor, in order to prevent the grant of a patent to another person for the same alleged invention upon an application filed during the life of the caveat, without notice to the caveator. Any person who has made a new invention and desires further time to mature the same, may, on payment

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(37) Printed copies of these may be obtained from the Patent Office for five cents apiece.

(38) U. S. R. S., Sec. 4924.

(39) U. S. R. S., Sec. 4895, 4916.

(39a) Walker on Patents, §§ 321-2; § 44a, n. 9, below.

(39b) The sections of the patent statutes relating to caveats were repealed by the act of July 1, 1910, and therefore this subsection is no longer in force.

of a fee of ten dollars, file a caveat (40), setting forth the object and distinguishing characteristics of the invention, and praying protection of his right until he shall have matured his invention. Such caveats are filed in the confidential archives of the Patent Office, and preserved in secrecy, and are operative for a term of one year, but may be renewed for like periods upon payment of an additional fee of ten dollars in each case. A caveat comprises a specification, oath, and, when the nature of the case admits of it, a drawing, and, like an application for a patent, must be limited to a single invention or improvement. The same particularity of description is not required in a caveat as in an application for a patent; but the caveat must set forth the object of the invention and the distinguishing characteristics thereof, and it should be sufficiently precise to enable the office to judge whether there is a probable interference when a subsequent application is filed for a similar invention. The oath must set forth that the caveator believes himself to be the original and first inventor of the art, machine, or improvement set out in his caveat.

If at any time during the life of such caveat, or one of its renewals, another person should file an application for an invention which would in any manner interfere with the invention set out in the caveat, notice is given to the caveator and he is afforded an opportunity to file a complete application for a patent upon his invention. Such application is thereupon examined, and if his invention is found patentable, he is entitled to an interference with

(40) U. S. R. S., Sec. 4902.

the previous applicant, which interference is determined in favor of one or the other of such parties in the usual manner.

Otherwise than by giving the caveator the right to be notified in case of the filing of an application, and the opportunity to file an application and be heard on the question of priority as above noted, a caveat confers no rights, and affords no protection. In the majority of cases which are brought to the patent solicitor for an opinion as to the advisability of filing a caveat it is found upon examination that the invention is fully completed, and in such cases it is ordinarily considered the better practice not to file a caveat, but to file an application for a patent at once. If a caveat is filed in such a case, and an application is afterwards filed by another, resulting in notice to the caveator, an application by him, and an interference between the two parties, the caveator is met at the outset by his statement that *at the date of the filing of his caveat he desired further time to mature his invention,* whereas the applicant for a patent may show that on such a date his invention was complete. The caveator is therefore at a disadvantage, whereas, if his invention was in fact *complete* at the date that he filed his caveat, and he had filed an application instead, he would have had the advantage, over the second applicant, of having an earlier filing date.

§ 40. **Secrecy in Patent Office.** All caveats (40a) and pending applications are preserved in the Patent Office in secrecy. No information will be given, without authority, respecting the filing by any particular person of a caveat,

(40a) See note (39b) above.

or of an application for a patent, or for the reissue of a patent, the pendency of any particular case before the office, or the subject matter of any particular application; except in the case of interference proceedings, where the parties are given such information respecting each other's applications as is necessary for them to properly present their cases (41).

After a patent has issued, the model, specification, drawings, and all documents relating to the case are subject to general inspection, and copies, except of the model, will be furnished at the rates specified by the Patent Office.

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(41) U. S. R. S., Sec. 4902.

CHAPTER IV.

TITLE, CONVEYANCES, AND CONTRACTS RELATING TO PATENTS.

§ 41. **Statute.** The Patent Act provides that: "Every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof"; and also that acknowledgment shall be prima facie evidence of the execution of any such instrument (1).

As patents are wholly the creatures of statute, the *legal* title to them can not be acquired except in the manner provided by the statute; but equitable interests may be acquired otherwise (2). In carrying out the provisions of this Act, the Patent Office has adopted the following definitions:

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(1) U. S. R. S., Sec. 4898.

(2) Walker on Patents, Sec. 274. It has been seen above that rights in unpatented inventions and pending applications are assignable. See § 23.

§ 42. **Assignment, grant, license, and recording.** An assignment is a transfer of the whole interest of the original patent or of an undivided part of such whole interest, extending to every part of the United States (3). It must be in writing (4).

A grant confers the exclusive right, under the patent, to make, use, and vend, and to grant to others the right to make, use and vend the thing patented within and throughout some specific part of the United States, excluding the patentee therefrom (3). A grant must likewise be in writing.

A license confers an interest less than or different from an assignment or a grant. A license may be oral or written (3).

No instrument will be recorded which is not in the English language, and which does not, in the judgment of the Commissioner, amount to an assignment, grant, mortgage, lien, incumbrance, or license, or which does not affect the title of the patent to which it relates. Every such instrument should also identify the patent by date and number (5).

§ 43. **Conditional assignments.** Assignments which are made conditional on the performance of certain stipulations, as the payment of money, if recorded in the Patent Office, are regarded as *absolute assignments* until cancelled with the written consent of both parties, or by the decree of a competent court; the reason for this rule

(3) Rule 196.
(4) U. S. R. S., Sec. 4898.
(5) Rule 198.

being that the office has no means of determining whether or not the conditions have been fulfilled (6).

§ 44. **Operation and effect of license.** Any conveyance of a right under a patent, which does not amount to an assignment or a grant, is a license. As the patentee is granted, under his patent, the exclusive right to make use and sell his device, he may by license, transfer to another any one or more of his rights under the patent, without transferring them all—for example, he may give another the exclusive right to make, or to use, or to sell, or to make and use, or to make and sell, or to use and sell; or the exclusive right to make, use, and sell for certain purposes, but for no others (7).

§ 44a. **No implied warranty of validity.** An assignment grant, or license carries with it no implied warranty of the validity of the patent, and a licensee sued by the licensor for royalties, cannot defend by showing merely that the patent is invalid; the reason for this rule being, as stated in a leading case on the subject (8), that the licensee may nevertheless have had all the benefit of a valid patent, because his exclusive title may never have been disputed. As long as he continues to exercise the rights which the license purports to give him, it will be presumed that he is acting under the license, and there will be a corresponding obligation on his part to pay the royalties reserved; the rule, as there stated, being "that something corresponding to an eviction must be proved if a licensee would defend against an action for royal-

(6) Rule 199.

(7) Walker on Patents, § 296.

(8) White v. Lee, 14 Fed. 789.

ties." And in other cases it has been held, reasoning on the similarity of a licensee's interest to a leasehold estate in realty, that a licensee can show facts amounting to an eviction where such have occurred. It would amount to an eviction if the patent is repealed in an action brought by the United States for such purpose; or if it is declared void in an interference proceeding brought under Section 4918 of the Revised Statutes (9), or in an action for infringement (10), as in all these cases the licensee is disturbed in his exclusive possession.

A carefully drawn contract of assignment, grant, or license, should of course provide for all the contingencies above noted, by express provisions, so as to leave no room for doubt on the question of the rights of the parties in case the patent is afterwards found invalid.

§ 45. **Suggestions in regard to contracts relating to patents.** Difficulties have often arisen in the construction of contracts wherein the patentee sells and conveys the full legal title to his patent, and in return accepts a promise to pay royalties, or some portion of the profits to be realized. In such a case, if the purchaser refuses to operate under the patent, so that there are no profits; or is unsuccessful in his undertaking; or if there is a voluntary or involuntary sale of his business to a

(9) This section provides that "whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court . . . may adjudge . . either of the patents void in whole or in part."

(10) Walker on Patents, Sec. 307, and cases cited.

stranger, the seller may have little or no remedy for his loss of expected profits. Such contingencies should be provided for by appropriate covenants of warranty, or by conditions of defeasance whereby the seller may re-vest title in himself, or by other provisions.

Litigation has also arisen over sales of patents and agreements of the vendees to use the patented devices, when such devices have afterwards been found to be impractical, or worthless. There are opinions holding that the vendee may show the worthlessness of the invention as a defense to an action for the purchase price (11), but the further question arises whether *worthlessness* means *lack of utility* in the patentable sense; or whether it has a broader meaning, so that a device which is *useful* in the patentable sense may be shown to be worthless in the popular sense. In Massachusetts it has been held (12), that the first definition is correct, as where a jury was told that an improved animal-power churn device was useful if capable of any beneficial use, notwithstanding its use for churning or operating a sewing machine or pump might not be profitable to the person applying it to such use, and notwithstanding the mechanical results of the use might be inadequate to the cost of its use and the cost of the machine. Such contingencies as this should also be provided for.

Provision should also be made in behalf of the pur-

(11) Article by Mr. Charles P. Abbey, of the Chicago Bar, read before the Patent Law Association of Chicago, January 30, 1908. From this article also, the suggestions contained in this subsection are in large part taken.

(12) Nash v. Lull, 102 Mass. 60.

chaser for securing to him appropriate rights in future improvements of the patented device, as it frequently happens that the inventor will continue his endeavors in the same field, and will obtain other patents on subsequent improvements of the patented device which will deprive the original device of much of its commercial value. It is customary to draw contracts of assignment to cover the patent assigned, and also the inventor's rights in future improvements of the patented device.

Conditions in contracts of license restricting the selling price of the patented articles, and otherwise placing restrictions upon subsequent dealings in them, are valid, and are not forbidden by the Sherman anti-trust act, nor by any other legislation against monopolies. In a recent case (13), it was said: "The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The object of these laws is monopoly, and the rule is, with a few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Other questions arising out of such contracts will be considered in the chapter of this article relating to Infringements, § 56, below.

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(13) Bement v. National Harrow Co., 186 U. S. 70; reaffirmed in Cortelyou v. Johnson & Co., 207 U. S. 196.

§ 46. **State statutes, relating to assignments of patents.** In many states statutes are in force imposing restrictions and conditions upon the sale of patents within their territory. In Kansas, Arkansas, Indiana, North Dakota, Ohio, and several other states (14), statutes have been passed, generally providing that notes given in payment of patent rights should be plainly marked "Given for a patent right"; and should, if transferred, be subject to all defenses which could be urged against the promisee. Other provisions require the taking out of licenses in the various counties, and the payment of license fees before sales can be made in such counties; and make violations of the statutes punishable by fine and imprisonment. Several of these statutes were held unconstitutional by the highest courts of the states, and by the Federal courts sitting in the states which passed them, but recently the provisions of two of these statutes with regard to the marking of promissory notes, and the admission of defenses against a holder in due course, were held valid by the Supreme Court of the United States (15).

It is therefore necessary also, when making sales of patents or otherwise dealing in them, to consider the provisions of any state statute concerning the subject matter, which may be in force in the jurisdiction where the transaction takes place.

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(14) A number of these statutes are collected and commented on in an interesting article by Mr. Albert H. Adams, of the Chicago Bar, read before the Patent Law Association of Chicago, June 14, 1907.

(15) Allen v. Riley, 203 U. S. 347; Woods v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Co. Nat. B'k, 207 U. S. 195.

§ 47. Regulation of dealings in patented articles. In addition to the statutes mentioned in the subsection preceding this, statutes, ordinances, and other laws in force in all the states, regulating the buying, selling and dealing in, and handling, storing and transporting of all kinds of property in general, frequently operate upon patented articles and devices, and in so far as they impose the same restrictions upon the exercise of acts of ownership in all kinds of property in the same class, whether patented or unpatented, they are held valid, generally as police regulations. Such a case was presented in Patterson v. Kentucky (16), where the patentee of an illuminating oil claimed the right to sell his oil in the state, notwithstanding a statute which prohibited the sale of all inflammable oils below a certain fire test. The statute was upheld, and a conviction for its violation sustained, the Supreme Court stating the rule, upon which the statutes noted in this subsection are distinguished from those noted in the preceding one, in these words: "We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the state established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a state, of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits. . . .

(16) 97 U. S. 501.

The right of property in the physical substance. which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself. . . . The end of the statute (the Patent Act) was to encourage useful inventions, and to hold forth, as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using is not enlarged or affected."

CHAPTER V.

INFRINGEMENT.

§ 48. What is infringement. Since the Patent Act gives to the patentee, his heirs and assigns, during the life of the patent, the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof (1), any unauthorized making, using or vending of the patented invention in the United States or its territories, during such time, is an infringement of the patent (2).

Wherever it is clear that the device or process used by the defendant in an infringement suit is the identical device or process described and claimed in the patent, the question of infringement is of course free from doubt, but in several other cases, which will be discussed below, it has been determined that the defendant has used the patented invention, and infringement has been found, although his device or process was not identically the same as that described and claimed in the patent.

§ 49. Colorable deviation. It is infringement to use a mere colorable variation of the patented device or process. Whether or not an alleged infringing device is merely a colorable variation, or is so substantially different from

(1) U. S. R. S., § 4884.

(2) Goodyear Shoe Mach. Co. v. Jackson, 112 Fed. 146.

the patentee's device as to be outside the scope of his claims, is a question of fact to be determined in each case.

If the mode of operation of an alleged infringing device or process is essentially different from that claimed in the patent, there is no infringement (3); but if the mode of operation is the same, there may or there may not be infringement, according to the determination of several other facts.

In the case of the *Cawood patent* (4), the complainant's machine for mending railroad rails consisted of an anvil having one of its end faces so shaped as to provide one of the jaws of a vice, between which and a movable jaw, the rail could be rigidly clasped and solidly supported. One of the alleged infringing machines (5) was provided with a pair of jaws similar to the Cawood jaws, but did not support the rail upon the anvil; and another (6) supported the rail upon the anvil but did not clasp it between vice-jaws, it being provided with two jaws which rested in a V-shaped notch in the anvil and were forced together by reason of their weight. Both of these machines were held to differ from the patented machine in their mode of operation, and to escape infringement on that ground. In this case the court used the following language: "To the inquiry, what constitutes an infringement, . . . it is indispensable to keep in mind what the invention pat-

(3) Walker on Patents, § 341.

(4) Turrill v. Railroad Co., 1 Wall. 491; Cawood Patent, 94 U. S. 695.

(5) Id. at p. 705.

(6) Id. at p. 706.

ented is. It is not . . . any mode by which the result sought and obtained is secured but a machine that attains the desired end by means of described agencies, combined in a described manner and operating in a described way." And the alleged infringing machines in question were held not to operate in the way described in the patent.

§ 50. **Substitution of equivalents.** It is infringement to substitute for the elements of a machine, or of a process, their mechanical equivalents. An equivalent has been defined as something which performs the same function in the same manner, as the thing of which it is alleged to be an equivalent (7). It is such as a mechanic of ordinary skill, in the construction of similar machinery, having the plaintiff's specification and machine before him, could substitute in the place of the mechanism described without the exercise of the inventive faculties (8).

Examples are found in Whitney v. Mowry (9), where it was held that placing red-hot car wheels in a pit with alternate layers of charcoal, which was ignited thereby, for the purpose of annealing, was equivalent to placing the wheels in a previously heated furnace; and in Tilghman v. Morse, (10), where a patented process for engraving stone, metal, glass, etc., by a sand blast, the sand being impelled against the surface being treated by mechanical means, was held infringed by a similar process wherein the sand was impelled by gravity; and in

(7) Walker on Patents, Sec. 354. See § 15, above.
(8) Burden v. Corning, Fed. Cas. No. 2143.
(9) Fed. Cas. No. 17592.
(10) Fed. Cas. No. 14044.

Gibson v. Harris (11), where it was held that in a planing machine, two smooth plates of iron, operated on by a screw and spring, to keep the board on its bed, were the equivalents of the patentee's pressure rollers; and in Atlantic Giant Powder Co. v. Goodyear, (12), it was held that an explosive compound consisting of a combination of nitro-glycerine with infusorial earth was infringed by one in which the nitro-glycerine was mixed with a mealed powder composed of nitrate of soda, charcoal and sulphur, it appearing that the powder, as an ingredient, was substantially the same as the infusorial earth in function and effect, *although possessed of additional advantageous qualities as well.*

The last case above also affirmed the rule that when a substitute is used for one ingredient in a patented combination, which has every property, and performs every function of the original in the combination, it does not cease to be an equivalent because, in addition, it does something more, and does it better.

§ 51. **Same (continued).** The true criterion of mechanical equivalence is identity of purpose, and not of form or name; and this is a question of fact to be judged of on inspection; or on the testimony of experts. It is an inference to be drawn from all the circumstances by attending to the consideration whether the contrivance used by one party is used for the same purpose, performs the same duties, or is applicable to the same object as the contrivance of the other party (13).

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(11) Fed. Cas. No. 5396.

(12) Fed. Cas. No. 623.

(13) In re Boughton, Fed. Cas. No. 1696.

In invoking the doctrine of equivalents, a patentee who has made a primary invention is entitled to a more liberal application of the test of equivalency, than one who has made a secondary invention. A primary invention is one which performs a function never performed by any earlier invention; while a secondary invention is one which performs a function previously performed by some other invention, but which performs that function in a substantially different way from any that preceded it (14). Inventions of the latter kind are merely improvements over the devices or processes which preceded them.

In two cases laying down the rule of the preceding paragraph, it was said: "If the patentee be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same function by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first" (15). And: "In such cases, if

(14) Walker on Patents, Sec. 359.

(15) McCormick v. Talcott, 20 How. 405.

one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance toward the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs'' (16).

§ 52. **Change of form.** A machine which contains all the essential elements, or their equivalents, of the patented machine, infringes the patent, notwithstanding mere differences of form (17). This rule ordinarily applies to differences in appearance, name, shape, proportions, dimensions and to mere structural differences generally (18).

§ 53. **Additions to and improvements upon patented inventions.** Adding to, or improving upon a patented invention does not negative infringement, even though the additions or improvements may amount to independent inventions, and may have been patented to the infringer as such. A contrary rule would in many cases deny protection to the pioneers in the various fields of invention, as their early inventions are almost always improved upon by others, who subsequently obtain patents for their respective improvements.

But one who has himself improved an old device, and

(16) Ry. Co. v. Sayles, 97 U. S. 556.

(17) 4 Words & Phrases, 3590.

(18) 22 Am. & Eng. Ency. of Law (2nd ed.), 452.

has obtained a patent for his particular improvement, cannot prevent others from also improving such old device, provided their improvements are substantially different from his, within the meaning of the patent law (19). A contrary rule would work injustice in many cases by enabling a patentee, who does not have the merit of being a pioneer inventor in his field, but who has merely followed the suggestion of another, to suppress further invention in the same field by others who are not using his ideas at all.

And in general it may be said that infringement is not avoided by a mere change of form or renewal of parts, or reduction of dimensions, or the substitution of mechanical equivalents, or the studious avoidance of the literal definition of specifications and claims, or the superadding of some improvements. If the device contains material features of the patent in suit it will constitute an infringement, though those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement (20).

§ 54. **Infringement of combination.** One who uses all of the elements of a patented combination of elements, infringes such combination, whether he uses other elements in addition, or not; but one who omits one or more of such elements does not infringe the combination. It is therefore important, in drawing claims to a combination (which is an ordinary way of claiming machines and manufactures, as these things are usually merely

(19) 22 Am. & Eng. Ency. of Law (2nd ed.), 458.

(20) Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845; O'Reilly v. Morse, 15 How. 62.

combinations of elements) to include in the broadest claims only such elements as are essential to the operation of the device, as otherwise any one might subsequently escape infringement by omitting an unessential element of the patented combination. On the other hand, all essential elements must be included, or the claim will be held void on the ground that the combination is inoperative. It therefore often requires a nice discrimination to determine what to include, and what not to include in such claims.

§ 55. **Infringement of compositions of matter and design patents.** The rule of the preceding sub-section applies also to patents for compositions of matter, and one who uses all of the ingredients of the composition as claimed, infringes, whether he uses other ingredients in addition or not; but one who omits one or more of such ingredients does not infringe.

The same principles which govern in determining the question of infringement of patents for the kinds of inventions above considered, govern in general in determining the question of infringement of a design patent. The test is one of identity of appearance, but identity in this sense means only substantial identity, as in the case of the other kinds of patents, and a mere difference of lines in the two designs, a greater or smaller number of lines, or slight variations of configuration, will not destroy the substantial identity (21).

To constitute infringement of a patent for a design, it is not essential that the appearance should be the same to

(21) Gorham Mfg. Co. v. White, 14 Wall. 511.

the eye of an expert, but the true test is the eye of an ordinary observer. If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the patented design is infringed by the other (22).

§ 56. **Contributory infringement.** One who, without himself making, using, or selling a patented invention, does acts which aid or encourage another in infringing the patent, may be guilty of contributory infringement. Thus, where the defendant made a machine which did not infringe the plaintiff's patent, but was so made that it might easily be adjusted by a third person so as to infringe, and the intention was that it should be so adjusted, and it was so adjusted, the defendant was held to be guilty of contributory infringement (23); and likewise, where the constituents of a patented hair dye were sold by the defendant in separate bottles, accompanied by a circular containing directions for the application of the contents of the bottles, similar to the specification of the patent (24).

Recently the doctrine of this section has been passed upon by the courts a number of times in cases wherein patented machines and devices have been sold or leased with conditions governing their subsequent sale or use, and such conditions have been broken, the question being

(22) Ibid.

(23) Knight v. Gavit, Fed. Cas. No. 7884.

(24) Imperial Chem. Mfg. Co. v. Stein, 69 Fed. 616.

whether or not a third person who aids in such breaking of a condition is guilty of contributory infringement.

In Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co., (25), the complainant was the owner of a patent covering a machine for affixing buttons to shoes by means of staples. The staples were necessarily of exactly the same size as the chute of the machine through which they were fed. The complainant sold no rights to manufacture the machines, but manufactured the machines and furnished them to the trade, each machine having affixed thereon the following label:

"Condition of Sale.

"This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

The machines were sold to shoe dealers at actual cost of the machine, and the patentee derived its profit on its monopoly from the sale of staples to purchasers of the machines. The defendants made and sold staples adapted only for use with the machines of complainant. The bill of complaint alleged that the defendants were guilty of contributory infringement by selling staples to purchasers of the complainant's machines, as they thereby induced such purchasers to infringe complainant's patent. It

(25) 77 Fed. 288. See also Tubular Rivet and Stud. Co. v. O'Brien, 93 Fed. 200; Victor Talk. Mach. Co. v. The Fair, 123 Fed. 424; Crown Cork and Seal Co. v. Brooklyn Bot. Stop Co., Fed. Rep. Advance Sheet, Oct. 21, 1909.

was held that the defendants were infringers of the patent, although they had neither made, sold, nor used machines infringing the patent, but had merely supplied to purchasers of such machines staples to be used in connection with them, in violation of the inscription upon the metal label affixed to the machine. "Within his domain the patentee is czar" (26).

§ 56a. **Same (Continued).** Since the first edition of this work the doctrine of the foregoing sub-section has twice been passed upon by the Supreme Court of the United States. In the first case, Henry v. A. B. Dick Co., 224 U. S. 1, a question was certified to the Supreme Court as follows:

"This action was brought by the complainant, an Illinois corporation, for the infringement of two letters patent, owned by the complainant, covering a stencil-duplicating machine known as the 'Rotary Mimeograph.' The defendants are doing business as copartners in the city of New York. The complainants sold to one Christina B. Skou, of New York, a Rotary Mimeograph embodying the invention described and claimed in said patents under license which was attached to said machine, as follows:

License Restriction.

> This machine is sold by the A. B. Dick Company with the license restriction that it may be used only with the stencil paper, ink, and other supplies made by A. B. Dick Company, Chicago, U. S. A.

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(26) See an interesting paper by Mr. George L. Wilkinson of the Chicago Bar, on the doctrines of this subsection, entitled "The Czar's Domain," read before the Patent Law Association of Chicago, May 21, 1908.

"The defendant, Sidney Henry, sold to Miss Skou a can of ink suitable for use upon said mimeograph with knowledge of the said license agreement, and with the expectation that it would be used in connection with said mimeograph. The ink sold to Miss Skou was not covered by the claims of said patent.

"Upon the facts above set forth the question concerning which this court desires the instruction of the Supreme Court is:

" 'Did the acts of the defendants constitute contributory infringement of the complainant's patents?' "

It was held by a divided court that they did.

In the majority opinion, the court, after pointing out the distinction between the property right in the materials composing a patented machine and the right to use them for the purpose and in the manner pointed out by the patent, went on to say:

"We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee. If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases. . . .

"We come, then, to the question whether a suit for infringement is here presented.

"That the license agreement constitutes a contract not to use the machine in a prohibited manner is plain. That defendants might be sued upon the broken contract, or for its enforcement, or for the forfeiture of the license, is likewise plain. But if, by the use of the machine in a prohibited way, Miss Skou infringed the patent, then she is also liable to an action under the patent law for infringement. Now that is primarily what the bill alleged, and this suit is one brought to restrain the defendants as aiders and abettors to her proposed infringing use."

It should be noted that the court was not called upon to decide what acts on the part of an alleged contributory infringer are necessary in order to charge him with having intended his product to be used in an infringing way, as is plain from the following quotation:

"The facts upon which our answer must be made are somewhat meager. It has been urged that we should make a negative reply to the interrogatory as certified, because the intent to have the ink sold to the licensee used in an infringing way is not sufficiently made out. Undoubtedly a bare supposition that by a sale of an article which, though adapted to an infringing use, is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only

adapted to an infringing use. . . . It may also be inferred where its most conspicuous use is one which will co-operate in an infringement when sale to such user is invoked by advertisement. . . .

"These defendants are, in the facts certified, stated to have made a direct sale to the user of the patented article, with knowledge that under the license from the patentee she could not use the ink, sold by them directly to her, in connection with the licensed machine, without infringement of the monopoly of the patent. It is not open to them to say that it might be used in a noninfringing way, for the certified fact is that they made the sale, 'with the expectation that it would be used in connection with said mimeograph.' The fair interpretation of the facts stated is that the sale was with the purpose and intent that it would be so used."

§ 56b. **Same (Continued).** The limits to which the doctrine of the foregoing sub-section may possibly be extended are not suggested by the majority of the court, but that three of the judges were seriously apprehensive of harm in sustaining a patentee's monopoly on such broad ground is plain from their dissenting opinion, from which the following is taken:

"Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine, or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the

planes to the use of lumber sawed from trees grown on the land of a particular person, or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to everyone,—a patented sewing machine. It is now established that, by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine of thread, needles, and oil lubricants or other materials convenient or necessary for operation of the machine. The illustrations might be multiplied indefinitely. That they are not imaginary is now a matter of common knowledge, for, as the result of a case decided some years ago by one of the circuit courts of appeal, which has been followed by cases in other circuit courts of appeal, to which reference will hereafter be made, what, prior to the first of those decisions on a sale of a patented article, was designated a condition of sale, governed by the general principles of law, has come in practice to be denominated a license restriction; thus, by the change of form, under the doctrine announced in the cases referred to, bringing the matters covered by the

restriction within the exclusive sway of the patent law. As the transformation has come about in practice since the decisions in question, the conclusion is that it is attributable as an effect caused by the doctrine of those cases. And, as I have previously stated, it is a matter of common knowledge that the change has been frequently resorted to for the purpose of bringing numerous articles of common use within the monopoly of a patent when otherwise they would not have been embraced therein, thereby tending to subject the whole of society to a widespread and irksome monopolistic control."

§ 56c. **Same (Continued).** In the second case in the Supreme Court involving the doctrine of contributory infringement—Standard Sanitary Manufacturing Company v. United States, 33 Supreme Court Reporter 9, a civil and a criminal suit were brought by the government against the defendants for violation of the Sherman Anti-Trust Act and it appeared that agreements had been made embracing 85% of the manufacturers of and 90% of the jobbers in enameled iron ware, which, in addition to a provision against the marketing of "seconds," intended to carry out the ostensible object of the agreements, also provided for regulating prices through the instrumentality of a price and schedule committee; fixed preferential discounts, confining them to sales to jobbers only; authorized rebates if the agreements should be faithfully observed; and forbade all sales to jobbers not in the combination, making a condition of their entry a promise not to resell to plumbers except at the prices determined by the manufacturers, and not to deal in the

products of manufacturers not in the combination. The agreements had been made by the defendants in the form of licenses from the owner of a patent for a device used in the enameling process.

It was held that the agreements were illegal, the court saying:

"In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, 'cash bail.' The royalty for each furnace was $5, 80 per cent of which was to be returned if the agreement was faithfully observed; it was to be 'forfeited as a penalty' if the agreement was violated. And for faithful

observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination.

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in Henry v. A. B. Dick Co., 224 U. S. 1, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in titles combined them in W. W. Montague & Co. v. Lowry, 193 U. S. 38, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights

for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights—rights which may be pushed to evil consequences, and therefore restrained.

"This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.' United States v. American Tobacco Co., 221 U. S. 106, 181. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results" (26a).

§ 57. **Marking "patented."** It is the duty of a patentee to mark all patented articles *made* or *sold* by him with the word "patented," together with the day and

(26a) Toward the close of May, 1913, in the case of Bauer & Cie v. O'Donnell, 229 U.S. 1, the Supreme Court of the United States, divided 5 to 4, handed down another opinion, overruling Victor Talk. Mach. Co. v. The Fair (note 25) and holding that a patentee cannot control the resale price of a patented article.

year the patent was granted. In any suit for infringement, by a party failing so to mark, no damages can be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented. Marking an unpatented article with the word "patent," or any word implying that the same is patented, for the purpose of deceiving the public, is an offense punishable by a fine of not less than one hundred dollars, with costs (27).

§ 58. **Jurisdiction of Federal courts.** The circuit courts of the United States have original jurisdiction in law and in equity of all suits arising under the patent or copyright laws of the United States. Appeal lies from such courts to the various circuit courts of appeals, and since the Judicature Act of February 19, 1897, the decisions of these latter courts are final in all patent cases; except that they may certify questions or propositions of law to the Supreme Court, or the Supreme Court may require, by certiorari or otherwise, any such case to be certified to it for review and determination. The jurisdiction of the United States courts in patent cases is exclusive of the courts of the several states (28).

§ 59. **Damages in actions at law for infringement.** In any action at law for infringement of a patent, the court may award damages in any sum above the amount found by the verdict as the actual damages sustained, accord-

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(27) U. S. R. S., Sec. 4900-1.

(28) U. S. R. S., Secs. 629 and 711.

ing to the circumstances of the case, not exceeding three times the amount of such verdict (29).

§ 60. **Actions in equity.** The circuit courts of the United States have jurisdiction in equity to enjoin the violation of any right secured by patent, and also to award treble damages in the same manner as in actions at law, above noted (30).

§ 61. **Defences to actions for infringement.** In any action for infringement, the defendant may show non-infringement, upon the principles hereinbefore considered; or that the patent is invalid either for want of patentable subject matter, or for fraud in obtaining it, or for want of novelty or utility, or for anticipation, or probably on any other ground; or he may defend on the ground of express or implied license; or probably on any equitable ground.

(29) U. S. R. S., Sec. 4919.

(30) U. S. R. S., Sec. 4921.

COPYRIGHT AND TRADE-MARKS.

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COPYRIGHT AND TRADE-MARKS.

CHAPTER I.

COPYRIGHT.

§ 1. **Right at common law.** At common law, the author, or owner of an original material product of intellectual labor had the exclusive privilege of first publishing the same; or the right to prevent it from being published by another, unless he should have first published it

himself (1). He had a right to determine whether or not it should be published at all, and if published, when, where, by whom, and in what form. But this exclusive right was confined to the first publication. When once published, his work was dedicated to the public, and the author had no exclusive right to multiply copies of it, or to control the subsequent issues of copies by others. This common law right is known as "common law copyright," or "copyright before publication." It is the right which an author has in his manuscript, and is a property right. In Palmer v. De Witt (1), it was said, after citing a number of cases: "An author or proprietor of an unpublished literary work has then a property in such work, recognized and protected both here and in England, and the use and enjoyment of it is secured to him as of right. This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable. It is personal, as other movable property, personal in contemplation, following the person of the owner, and is governed by the law of his domicile."

Of the justification for the right, it was said in the great case of Millar v. Taylor (2): "It is certain that every man has a right to keep his own sentiments if he pleases; he certainly has a right to judge whether he will make them public, or commit them only to the sight of his

(1) Palmer v. De Witt, 47 N. Y. 532.

(2) 4 Burr. 2303, 2379.

friends. In that state, the manuscript is, in every sense, his peculiar property, and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property; and as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that right is guilty of a manifest wrong, and the courts have a right to stop it."

§ 2. **Subjects included under common law right.** It has been held that at common law the author of an unpublished drama was entitled to an injunction to prevent the representation of such drama by others; that a writer of private letters could enjoin their publication by the recipient, on the ground that he retained such an interest in them as to entitle him to such protection; that a lecturer could prevent his lectures from being published; and that a newspaper could prevent the news collected by it from being published by others (3).

In general, the right which was protected at common law may be said to include "every new and innocent product of mental labor which has been embodied in writing, or some other material form, being the exclusive property of its author, the law securing it to him as such, and restraining every other person from infringing his right. Whether the ideas thus unpublished take the shape of written manuscripts of literary, dramatic, or musical compositions, or whether they are the designs for works of ornament or utility, planned by the mind of an

(3) See 1 Ames, Cases Eq. Jur., 658, note 1.

artist, they are equally inviolable while they remain unpublished, and the author possesses an absolute right to publish them or not as he sees fit, and (if he does not desire to publish them) to hinder their publication, either in whole or in part, by any one else'' (4).

§ 3. **Right under statutes.** The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others (or to publish it exclusively), is the creature of statute. It is the right secured by the copyright laws of the different countries. It is the right which an author or proprietor has, upon complying with the statutory requirements, to prevent others from publishing his works, even after he has published them himself; and it is known, in contradistinction to the right above noted, as ''statutory copyright,'' or ''copyright after publication.''

§ 4. **Constitutional provision.** The statutory copyright law of the United States is based on the acts of Congress passed in pursuance of the constitutional provision giving to Congress power ''to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'' (5). In pursuance of such power, the first Congress passed an act for protecting the authors and proprietors of maps, charts, and books; and succeeding Congresses have extended the protection by many other acts passed since.

§ 5. **Copyright law of the United States.** The United

(4) Shortt, Law of Lit., 48.

(5) Const. Art. 1, Sec. 8.

States statute, relating to copyright, at present in force, is the act of March 4, 1909 which has just gone into effect (6). It provides, in general, for the publication of the work with a notice of copyright, and the deposit promptly thereafter of two copies of the work in the Copyright Office with a registration fee of $1.00. This act secures for the work the full copyright protection for a period of twenty-eight years, with a privilege of renewal for the same period. The United States courts are given jurisdiction to enforce the rights arising under the copyright acts.

§ 6. **Scope of Act.** Section 4 of the Copyright Act, following the words of the Constitution, provides that the works for which copyright may be secured shall include *all the writings of an author.* In other words, the Act is intended to cover everything which Congress can protect under the power given it by the Constitution, and, in this respect, the Act is the broadest of any copyright act so far enacted by Congress.

§ 7. **What are "writings of authors."** From some of the provisions of previous copyright acts, which carefully enumerated all the works which could be included within their protection, and from the decisions construing the latter, it is apparent that the following works may be copyrighted as the writings of authors:

1. *Books,* including composite and cyclopædic works, directories, gazeteers, and other compilations. By the term "book" in the copyright law is understood a *liter-*

(6) The text of this Act is printed by the Copyright Office of the Library of Congress for gratuitous distribution.

ary composition. All copyright legislation is based on the Constitutional provision granting to Congress the power to legislate for the protection of the *writings of authors.* For this reason, the mere fact that an article is printed, such as a mere list of words, or a sheet of disjointed phrases or sentences, or a blank form, or a blank book, does not entitle it to protection. Nor does the fact that an article is made up to resemble a book in form justify its registration for copyright protection. It must be a book in literary substance. A book prepared *for use in itself,* such as a book of blank forms, certificates, receipts, score sheets, or other similar productions, is not a proper subject for copyright protection and is not registrable.

2. *Periodicals.* This term includes all magazines, newspapers, or serial publications partaking of the nature of periodicals.

3. *Lectures, sermons* and *addresses* prepared for oral delivery.

4. *Dramatic* and *dramatico-musical compositions.* These terms must be understood to mean literary and musical compositions in dramatic form, and cannot be understood to mean mere stage business, specialty acts, stage names, stage curtains, scenarios, etc.

5. *Musical compositions.*

6. *Maps.*

7. *Works of art,* models and designs for, and reproductions of works of art.

8. *Drawings or plastic works* of a scientific or technical character.

9. *Photographs.*

10. *Prints* and *pictorial illustrations.*

11. *Compilations or abridgments, adaptations, arrangements, dramatizations, translations,* or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works published with new matter.

12. Anything else which can be reasonably construed as the writing of an author.

§ 8. **Extent of protection given.** The proprietor of any such copyrighted work is given, under section 1 of the Act, the exclusive right, during the term of the copyright:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate it into other languages or dialects, or make any other version of it, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatever thereof; to make or to procure the making of any transcription or record thereof by or from

which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatever;

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purpose set forth in subsection (a) above, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced; *with the exception however,* that copyright protection may be secured for only such parts of instruments serving to reproduce the musical work mechanically (i. e. phonographic rolls and discs, perforated rolls, metal discs, etc.) as produce compositions published and copyrighted after the Act went into effect (July 1, 1909); and not for such as produce the works of a foreign author or composer unless the foreign state or nation of which he is a citizen or subject affords similar rights to citizens of the United States.

§ 9. **Same: Illustrations.** An article forming part of an encyclopædia may be copyrighted by itself; and a fair abridgment of any book is considered a new work, as it requires labor and the exercise of judgment (7); also a composition, the materials of which were procured by another. There may be a valid copyright in the plan of a book as connected with the arrangement and combina-

(7) Storr v. Holcombe, 4 McLean 306.

tion of the material and the mode of displaying and illustrating the subject, although all the materials employed and the subject of the work may be common to all other writers (8). Compilations of railroad time-tables, or from voluminous public documents may be copyrighted. New editions of maps may be copyrighted. Labels on vials to designate medicines, etc., are not books within the Act. Legal blanks drawn in pursuance of the statutes so as to make a complete form, possess sufficient originality to be the subject of a copyright. No copyright can be secured for the publication of statutes alone, but there may be sufficient skill and judgment displayed in their combination and analysis to entitle the author to a copyright (9). No copyright can be secured in written opinions delivered by the courts, these being public documents; but a reporter is entitled to a copyright in the syllabi, and the statements and arguments of counsel prepared by him, but not in the statement of facts which form the basis of the decision reported (10).

Dramatic compositions may be copyrighted, but it has been held that a stage dance telling no story, portraying no character, and depicting no emotion, is not a "dramatic composition" within the meaning of the act; and that a mere exhibition, spectacle or scene, such as "The Black Crook," is not a dramatic composition, entitled to protection (11) within the meaning of the copyright laws. But a combination of dramatic events portraying a per-

(8) Greene v. Bishop, Fed. Cas. No. 5763.
(9) Davidson v. Wheelock, 27 Fed. R. 61.
(10) Little v. Gould, Fed. Cas. 8394.
(11) Martinette v. Maguire, Fed. Cas. 9173.

son tied to a railroad track and rescued at the last moment before an approaching train, was held entitled to protection, although its success was largely dependent on what was seen irrespective of the dialogue (12).

A musical composition as an idea or intellectual conception is not subject to copyright, but only in its material embodiment in the form of a writing or print.

Engravings, cuts, prints, and photographs are entitled to protection, and include pictorial illustrations drawn from real life; colored photographs or pictures of natural scenery; and films for moving picture machines (13). Likewise, paintings, drawings, chromos, and chromo lithographs, even though used for gratuitous distribution as an advertisement for the purpose of attracting business.

§ 10. **Right of alien to secure copyright.** Copyright may be secured under the Act by an alien author or proprietor only if he is domiciled within the United States at the time of the first publication of his work; or if he is a citizen or subject of a foreign state or nation which grants similar privileges to citizens of the United States.

§ 11. **Steps necessary to secure copyright registration: Where copies of work are to be reproduced.** In order to secure copyright protection for a work which is to be published, it is necessary, first: to publish it with a notice of copyright in the form prescribed by the act; and second: promptly after publication to send to the Copyright Office two copies of the best edition of the work, with an application for registration and a remittance of

(12) Daly v. Webster, 56 Fed. R. 483.
(13) Edison v. Lubin, 122 Fed. R. 240.

$1.00 (except in the case of photographs, for which, if a certificate of registration is not desired, the fee is only 50 cents), (14).

In the case of books or periodicals the two copies so deposited must have been printed from type set within the limits of the United States, or from plates made within, or by a process wholly performed within the United States, and the entire operation of printing, binding, and preparing illustrations must have been performed within the United States. And in the case of *books,* the copies deposited must be accompanied by an affidavit to such effect. Forms for the application and affidavit are supplied by the Copyright Office on request (15).

§ 12. **Same: Where copies of work are not to be reproduced.** When the protection is desired for a work of which copies are not to be reproduced for sale, it is secured by filing in the Copyright Office an application for registration, with the statutory fee of $1.00, and sending therewith:

(a) In the case of lectures or other oral addresses or of dramatic or musical compositions, *one complete manuscript or typewritten copy of the work;*

(b) In the case of photographs not intended for general circulation, *one photographic print;*

(c) In the case of works of art (paintings, drawings, sculpture); or of drawings or plastic works of a scientific or technical character, *one photograph or other identifying reproduction of the work.*

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(14) Copyright Act, Secs. 9, 10, 12.

(15) Id. Secs. 12, 15, 16.

In any such case, however, if the work is later reproduced in copies for sale, there must be deposited two copies of the best edition of the work as specified in § 11, above (16).

§ 13. **Registration fee and certificate.** In the case of several volumes of the same book deposited at the same time, only one registration, with one fee, is required.

The registration fee of $1.00 entitles the registrant to a certificate under the seal of the Copyright Office of the fact of registration, and such certificate the act declares shall be admitted in any court as prima facie evidence of the facts therein stated (17).

§ 14. **Penalty for failure to deposit copies of work.** Failure on the part of any proprietor of a copyright to deposit the two copies, above noted, from any part of the United States, except an outlying territorial possession, within three months (or, from an outlying territorial possession, within six months) after notice from the Register of Copyrights is punishable by a fine of $100, the payment to the Library of Congress of twice the amount of the retail price of the best edition of the work, *and the forfeiture of the copyright* (18).

If the two copies are delivered to a postmaster with a proper request, he will give a receipt for them, and will mail them to their destination without cost to the copyright claimant (19).

§ 15. **Form of copyright notice prescribed.** The form

(16) Id. Sec. 11.
(17) Id. Secs. 10, 55.
(18) Id. Sec. 13.
(19) Id. Sec. 14.

of copyright notice prescribed by the Act is as follows:

"Copyright (or, Copr.), 19...(year date of publication) by ..... (name of copyright proprietor)." But in the case of copies of works specified in paragraphs 6 to 10, both inclusive, of § 7 above, the notice may consist of the mark, thus, C, enclosed in a circle, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided* his name appears on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies are mounted (20).

§ 16. **Notice of Copyright.** Upon each copy of the published work there must be inscribed a notice of copyright in the form specified in § 15, above. If the work is a book or other printed publication this should appear upon the title-page or the page immediately following; if a periodical, either upon the title-page or upon the first page of text of each separate number or under the title heading; or if a musical work, either upon the title-page or the first page of music. But, one notice of copyright in each volume or in each number of a newspaper or periodical published is sufficient (21).

§ 17. **Term, renewal, and assignment.** The term of a copyright is twenty-eight years, and it may be once renewed for a further term of twenty-eight years (22).

A copyright may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor

(20) Id. Sec. 18.
(21) Id. Secs. 9, 18, 19.
(22) Id. Secs. 23, 24.

of the copyright, or may be bequeathed by will. An assignment is void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the office of the Librarian of Congress within three months after its execution (23).

§ 18. **Fees.** The fees of the Copyright Office are as follows: 1. For the registration of any work subject to copyright, one dollar, which sum includes a certificate under seal (except that for photographs the fee is only fifty cents if a certificate is not demanded). 2. For every additional certificate of registration, fifty cents. 3. For recording and certifying any instrument of writing for the assignment of copyright, or for any copy of such assignment, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length, two dollars; if more than one thousand words in length, one dollar additional for each one thousand words or fraction thereof over three hundred words (24).

§ 19. **Effect of registration.** The Copyright Office does not issue or grant copyrights in the sense in which the Patent Office grants patents. A patent is issued after a full examination by the Patent Office on the merits of the applicant's case, as set out in his application, and is an opinion by the Patent Office as to the patentability of his invention. The Copyright Office, on the other hand, merely *records claims* to copyright protection. It

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(23) Or six months in the case of execution without the limits of the United States. Secs. 42, 43, 44.

(24) Copyright Act. Sec. 61.

does not adjudicate the claims or pass upon them, or furnish any guaranty of literary or artistic property. It has no authority to question any claim as to authorship, or to consider conflicting claims, or to take any steps in relation to infringement. The acts of registration, deposit of the required copies, and inscribing with notice, as above set out, are prerequisite to the claim of *any right* at all after publication; but, upon the performance of such acts, the registrant's claim of copyright must depend, in case of any contest of his rights afterwards, upon his actual ownership of the work; and the legal effect of the registration will also depend upon whether or not the work is such as is entitled to copyright protection, even though it has been accepted by the Copyright Office. The effect of the registration is, in this respect, somewhat similar to the effect of recording a deed to land. It is public notice of the registrant's claim, but not an adjudication as to the merits of such claim.

§ 20. **Importation prohibited.** During the existence of the copyright, the importation into the United States, with a few unimportant exceptions, of any piratical copies of the work, or of any copies of a book which have not been produced within the United States, as noted in section 11, above; and of any plates not made from type set within the limits of the United States, or any copies produced by lithographic or photo-engraving process not performed within the limits of the United States, is prohibited. These prohibitions apply to the owner of the copyright as well as to others, and the treasury department is authorized to seize works imported in violation

of the prohibition, whether imported with his consent or not (25).

§ 21. **Infringement.** In §§ 6-8 above, there have been enumerated the various exclusive rights which are secured to a proprietor by the copyrighting of his work under the Act. It is an infringement of his copyright to do any act in violation of one of these rights.

§ 22. **Penalties for infringement.** One who infringes is liable, under the Act:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as he may have suffered, as well as all the profits which the infringer may have made from such infringement, or in lieu of actual damages and profits such damages as to the court shall appear to be just. And in assessing such damages the court may, in its discretion, allow the amounts stated below (except that in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars, nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and not be regarded as a penalty). The amounts are:

1. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made, or sold by, or found in the possession of the infringer or his agents or employes;

2. In the case of any work enumerated in section

(25) Id. Secs. 30, 31.

six of this article, except a painting, statue, or sculpture, one dollar for every infringing copy made, or sold by, or found in the possession of the infringer or his agents or employes;

3. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

4. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance.

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe the copyright; and

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies, as the court may order (26).

§ 23. **Same. Infringement wilful and for profit.** Any person who wilfully and for profit infringes any copyright secured by the Act, or who knowingly and wilfully aids or abets such infringement, is guilty of a misdemeanor, and, upon conviction, may be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred nor more than one thousand dollars, or both, in the discretion of the court (27).

(26) Id. Sec. 25.

(27) Id. Sec. 28.

§ 24. **False claim of copyright or fraudulent removal of notice.** Any one who, with fraudulent intent, inserts or impresses any notice of copyright required by the Act, or words of the same purport, upon any uncopyrighted article; or, with fraudulent intent, removes or alters the copyright notice upon any article duly copyrighted, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars nor more than one thousand dollars. Any person who knowingly issues or sells any article bearing a notice of United States copyright which has not been copyrighted in this country, or who knowingly imports any article bearing such notice or words of the same purport, which has not been copyrighted in this country, is liable to a fine of one hundred dollars (28).

§ 25. **Jurisdiction of courts.** The Circuit Courts of the United States have original jurisdiction of all suits at law or in equity arising under the patent or copyright laws of the United States.

§ 26. **Act does not annul or limit common law right.** Section 2 of the Act provides that nothing therein shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, duplicating, or use of such unpublished work without his consent, and to obtain damages therefore. It will be observed that this is the right described in § § 1 and 2 of this article, and Section 2 of the Act declares it shall still exist, independently of the Act. It follows, therefore, that the author of an unpub-

(28) Id. Sec. 29.

lished literary work has the choice of either taking no steps whatever to secure his rights, relying upon his right at common law to prevent unauthorized copying and publication; or of copyrighting his work, as an unpublished work, under the Act. Probably in the great majority of cases the latter course is advisable.

§ 26a. **Prints and Labels.** Since the first edition of this work the Attorney-General has ruled that Section 3 of the old Copyright Act of June 18, 1874, is still in force. This section reads as follows:

"Sec. 3. That in the construction of this act the words 'engraving, cut, and print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commisioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same."

CHAPTER II.

TRADE-MARKS.

§ 27. **Definition, origin, and nature.** A trade-mark is a sign, mark, symbol, word or words, or device attached to goods, and adopted by the manufacturer or seller thereof to distinguish his production from other productions of the same article. Its purpose is to indicate, not quality, but the origin and ownership of the article to which it is attached. It may consist of any design, mark, symbol, word or words, or device not previously appropriated by another, and not barred from use as a trade-mark by some rule of law (1). Trade-marks are of common law origin, and were recognized in a decision (2) as early as 1590, but did not obtain a very firm footing in the law until two centuries later.

§ 28. **Unfair competition distinguished from infringement of trade-mark.** Until comparatively recent times, the courts have often confused certain kinds of causes of action arising out of unfair competition in trade, with causes of action arising out of the infringement of trade-marks, although there is a distinction between the two. A cause of action arising out of a given state of facts may, however, often be based on either ground, for a case of infringement of a trade-mark ordinarily constitutes unfair competition also.

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(1) Newman v. Alvord, 51 N. Y. 189.

(2) Southern v. How, Popham, 144.

The essence of an action for unfair competition, of the kind here considered, is that the defendant has wrongfully represented to the public, expressly or by implication, that the goods sold by him are the goods of the plaintiff; the remedy which the courts afford being based upon the theory that the plaintiff has acquired in his business a reputation and good will which is property, and which they will protect from appropriation by another, and also partly upon the theory of protecting the public against fraud (3). If the action arises out of the use by the defendant of words or devices which have not been exclusively appropriated by the plaintiff as trade-marks, the plaintiff must show that such words have acquired a peculiar significance in connection with his business, and he must also show that the defendant has fraudulently used the same or like words for the purpose of unfairly taking advantage of plaintiff's reputation; although the deliberate and obvious simulation of plaintiff's device may create a sufficient presumption of fraud where no other sufficient reason for such simulation is shown.

The gist of an ordinary action for infringement of a trade-mark is that the defendant has used, or is using, on his goods, a mark *which belongs to the plaintiff*, and ordinarily it is not necessary for the plaintiff to show that he has built up a reputation under such mark, or that there was any knowledge or wrongful intent on the part of the defendant. But he must establish his trade-mark.

§ 29. **Trade names.** Trade-marks are also occasionally

(3) 28 Am. & Eng. Ency. Law, 2nd ed. 345.

confused with trade names, but more properly the latter are names used to designate the particular business of certain individuals; or the place where a particular business is carried on; or a class of goods; but are not technical trade-marks either because they are not applied or affixed to the goods, or because they have not been or cannot be appropriated as trade-marks.

§ 30. **Scope of this article.** Actions arising out of unfair trade competition, with no element of trade-mark infringement, are discussed in the article on Torts in Volume II, § 343, of this work. This article is confined to the subject of trade-marks alone, and more especially to the latter in so far as they are the object of Federal legislation and of Federal procedure.

§ 31. **How exclusive right to trade-mark is acquired.** The exclusive right to a particular word, device, or sign as a trade-mark, by a manufacturer, merchant, or trader, is acquired either by priority of appropriation, or by transfer or succession to one such party from another who has previously acquired it. The claimant of a trade-mark by user must have been the first to use or employ it on goods, manufactured or dealt in by him. A single instance of use, with accompanying circumstances evidencing an intent to continue that user is sufficient to establish the right, and there is no requirement that the use shall continue for any prescribed or definite length of time (4).

The United States Trade-Mark Act (5), which will be

(4) Hopkins, Trade Marks, 57.

(5) U. S. R. S. Secs. 4937-4947.

considered further on in these pages, does not confer on any one the exclusive right to a trade-mark, but merely provides for the registration of a trade-mark by one who has acquired the exclusive right to it; and that such registration shall be prima facie evidence of his right. As a trade-mark has no necessary relation to invention or discovery, as between two rival claimants it is the party who first actually uses a mark, and not the one who first thought of it or designed it, who is entitled to protection in its use as a trade-mark; and a mere declaration of intention to use a mark in the future does not create a right to its exclusive use as a trade-mark (6).

§ 32. **What marks may be acquired.** The rules of the common law as to what marks may or may not constitute valid trade-marks are substantially preserved in the Trade-Mark Act discussed hereinafter, section 5 of which declares what kinds of marks may be registered as trade-marks, and what kinds not.

§ 33. **Federal statutes relating to trade-marks.** The first attempt by Congress to legislate upon the subject of trade-marks is found in the act of July 8, 1870 (7), which provided for the registration in the Patent Office of any device in the nature of a trade-mark to which any person had by usage established an exclusive right, or which the person so registering intended to appropriate by that act to his exclusive use; and made the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit

(6) Hopkins, Trade Marks, 63, and cases cited.

(7) 16 Stat. 198.

for damages, or in a suit in equity for an injunction. This act was amended by the act of August 14, 1876 (8), which added a punishment by fine and imprisonment for the fraudulent use, sale and counterfeiting of trade-marks registered in pursuance of such act.

§ 34. **First act held unconstitutional.** In the Trade-Mark Cases (9), the entire act was held unconstitutional on the ground that Congress could not, under its constitutional power to protect authors and inventors, legislate on the subject of trade-marks; that the act was not in its terms confined to marks used in interstate commerce, or commerce with foreign nations, or with the Indian tribes, and therefore could not be supported under the clause conferring on Congress power to regulate such commerce; and that there was nothing else in the Constitution which could be construed as conferring on Congress power to pass such an act as the one under consideration.

§ 35. **Act of 1881.—Present act.** A few years later another act (10) was passed providing for registration in the Patent Office of trade-marks used in commerce with foreign nations, or with the Indian tribes, and giving remedies by civil actions in law and equity for infringements of such marks. The provisions of this act are superseded by the more comprehensive provisions of the

(8) 19 Stat. 141.

(9) 100 U. S. 82.

(10) Act of Mar. 3, 1881, c. 138 (21 Stat. 502); amended by act of Aug. 5, 1882, c. 393 (22 Stat. 298); R. S. Secs. 4937, 4947.

present act (11), which will be considered in succeeding paragraphs of this article.

The Trade-Mark Act in general provides for the registration in the Patent Office of trade-marks used in commerce with foreign nations, or among the several states, or with the Indian tribes, and confers upon United States courts jurisdiction in civil actions at law for damages and actions in equity for injunctions and damages, against any person wrongfully using any such registered mark in commerce among the several states, or with a foreign nation, or with the Indian tribes. The act, therefore, purports to be, and is, a regulation of such commerce.

§ 36. **Who may register?** Any owner of a trade-mark who is domiciled within the territory of the United States, or has a manufacturing establishment within the territory of the United States, or resides in or is located in any foreign country which by treaty, convention, or law affords similar privileges to the citizens of the United States, may, subject to the provisions of the act, register his mark in the Patent Office.

§ 37. **What marks may be registered?** Any mark used in commerce as above noted, by which the goods of the owner of the mark may be distinguished from other goods of the same class, may be registered, unless such trade-mark:

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(11) Act of Feb. 20, 1905, c. 592 (33 Stat. 724); amended by act of May 4, 1906, c. 2081 (34 Stat. 168); and by act of March 2, 1907, c. 2573 (34 Stat. 1251); R. S. Secs. 4937-4947. A pamphlet containing the Act of Feb. 20, 1905, and the amendatory acts cited, together with the rules of the Patent Office relating to the registration of trade marks, is printed by the Patent Office for gratuitous distribution.

1. Consists of or comprises immoral or scandalous matter.

2. Consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any state, or municipality, or of any foreign nation, or of any design or picture that has been, or may hereafter be, adopted by any fraternal society as its emblem.

3. Is identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties.

4. So nearly resembles a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers.

5. Consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual (11a).

6. Consists merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods.

7. Is merely a geographical name or term.

8. Is the portrait of a living individual (except by consent of such individual, evidenced by an instrument in writing).

Any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations, or among the several states,

(11a) The amendment to the Trade Mark Act, of February 18, 1911, reads as follows: "Provided further, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof."

or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from which he derived title *for ten years next preceding the twentieth day of February*, 1905, may be registered.

In determining what marks are, and what marks are not registrable under that part of the act which is set forth in substance above, probably controversies have arisen oftenest over clauses 4, 6, and 7, above. A reference to a few decisions will illustrate the considerations applicable in such cases.

§ 38. **What is such near resemblance as is meant by the act?** The words in the following groups have been held to be so nearly similar as to preclude registration of one of them, under the act, where one of the others had been previously registered:

"Oliveine" and "Olivant"; "Optal" and "Optine"; "Liveraid" or "Liverine," and "Liveroid"; "Camille Royal Combination" and "La Camille"; "Old Jay" and "Blue Jay"; "Club Cocktails" and "Chancellor Club"; "Kronpol," "Cronpine," or "Cronpelene" and "Cronpaline."

But the following marks have been held dissimilar for the purpose of registering one after a previous registration of the other: "Sozodont" and "Zodenta"; "Mayfield" and "Mayfair"; "Cuticura" and "Cuticle."

§ 39. **What is descriptive?** It is well established that a mark which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied cannot constitute a valid trade-mark at common law, and cannot be registered in the Patent Office, for the reason

that all persons who are entitled to produce and vend similar articles are entitled to describe them, and to employ any appropriate words for that purpose (12). A contrary rule would enable one party to appropriate certain descriptive words or phrases, and another party others, until a large part of the English language had been monopolized, and a later entrant into the field might have difficulty in finding words enough left to describe his goods.

Accordingly the following words have been held descriptive in the connection with which they were used: "Air-cell," for a fire-proofing material; "Apple and Honey," for a medicine; "Best," for flour; "Cantripum," for clothes; "Klean-well," for massage sponges; "Neverstick," for lubricants; "Vogue," for boots and shoes; "Sterling," for ale, on the ground that it denotes genuineness, purity, and superior quality; and "Standard," for machines, whether the machines are, in fact, of superior design or not; in other words, it makes no difference whether the word is correctly descriptive, or falsely descriptive.

But the following words have been held valid trade-marks: "Magnetic-Balm" for a medicinal compound; and "Electro-Silicon" for a polishing compound.

§ 40. **Descriptive symbols.** The following symbols have been held descriptive and incapable of appropriation: The picture of a bag having the open end thereof held closed by a tie, as a mark for bags; and the picture of a corn plaster, as a trade-mark for corn plasters, al-

(12) Bennett v. McKinley, 65 Fed. 505.

though not a picture of applicant's particular plaster.

§ 41. **Descriptive by long use.** A mark originally arbitrary may become descriptive by long use and association by the public, as for example: "Albany Beef" became descriptive for canned sturgeon (13); and "New Manny" for harvesting machines.

§ 42. **Word in foreign language.** A name in a well-known foreign language, descriptive of a certain product, cannot be a valid trade-mark on that product in this country, as where it was held (14) that "Matzoon," meaning (in Armenian) fermented milk, is descriptive and cannot be appropriated as a trade-mark; and that the party who introduced the beverages into this country is not entitled to the exclusive use of the name.

§ 43. **Descriptive word on another kind of article.** A descriptive word may be registered as a trade-mark on an article other than that of which it is descriptive, as where "Napthol Methane" was held (15) registrable for carbon black, on the ground that it is well known that such substance does not contain the chemicals indicated by the trade-mark.

§ 44. **New article.** When a new article is produced and is given an arbitrary name by those producing it for the first time, such name, being the only name by which that particular kind of an article is known, may thereafter be descriptive. Accordingly the word "Leclanche" was held to have become thus descriptive of a certain kind of battery, the court saying: "When an article is

(13) Ames, ex parte, 23 O. G. 344.

(14) Dadinian v. Yacubrian, 72 Fed. 1010; 90 Fed. 812; 98 Fed. 872.

(15) Castle Brook Carbon Black Co., ex parte, 100 O. G. 683.

made that was theretofore unknown, it must be christened with a name by which it can be recognized and dealt in; the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognizable'' (16).

§ 45. **Test.** And in general, it may be said that the test is to consider whether the public will on the whole regard the mark as an arbitrary symbol denoting only the origin and ownership of the goods, or as an advertisement of some desirable quality of the goods themselves (17); it is not whether the words are exhaustively descriptive of the article designated, but whether, in themselves and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended (18).

§ 46. **What marks are geographical?** A geographical name applied in its ordinary signification to merchandise is not a valid trade-mark, as for example, ''York,'' as a trade-mark for stoves and ranges; ''Clinton,'' as a trade-mark for wagons; and ''Elgin,'' for watches, as against manufacturers residing in the locality (19).

The name of a people has been held to be geographical, as for example, ''Grecian'' (20), and ''French.''

But a nickname has been upheld, as for example, ''Hoosier,'' for machinery, and ''Yankee,'' for soap (21).

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(16) Leclanche Battery Co. v. Western Elec. Co., 23 Fed. R. 276, 277.

(17) Brigham, ex parte, 20 O. G. 891.

(18) Rumford Chem. Wks. v. Muth, 35 Fed. 524.

(19) Illinois Watch Case Co. v. Elgin Nat. Watch Co., 94 Fed. R. 667, reversing 89 Fed. R. 487.

(20) Classic Corset Co. ex parte, 100 O. G. 1329.

(21) Williams v. Adams, 8 Biss. 452.

§ 47. **Proceedings in Patent Office.** An application for registration of a trade-mark in the Patent Office is in its essential respects similar to an application for a patent, and comprises a formal petition requesting registration, a statement of certain formal matters, a sworn declaration as to facts upon which the right to a registration is based, a drawing of the trade-mark, five specimens (22) of the trade-mark as actually used upon the goods, and a fee of ten dollars. The rules of the Patent Office establish classes of merchandise for the purpose of trade-mark registration, and determine the particular descriptions of goods comprised in each class. On a single application for registration, a trade-mark may be registered, at the option of the applicant, for any and all goods upon which the mark has actually been used, comprised in a single class of merchandise (23).

On the filing of such application, an examination is made, and if it appears that the applicant is entitled to a registration, the mark is accordingly published in the Official Gazette of the Patent Office. Thereupon any person who believes that he would be damaged by such registration may, at any time within thirty days, file a notice of opposition, duly verified, stating the grounds for such opposition. In all such cases, and in cases where an application interferes with a pending application in the Patent Office or with a certificate of registration previously issued to another, an interference proceeding, similar to an interference proceeding in the case of applications for

(22) Or facsimiles, when, from the mode of applying or affixing the trade mark to the goods, specimens cannot be furnished.

(23) Sec. 2, Act of May 4, 1906; Rule 30.

patents, is conducted, and it is thereby determined which party is entitled to registration. If no notice of opposition is filed within the time stated, or if the interference is decided in favor of the applicant, a certificate of registration is issued in due course. For details of the corresponding proceedings in patent cases, see Patent Law, §§ 34-35, elsewhere in this volume.

§ 48. **Term.** A certificate of registration remains in force for twenty years, but may be renewed from time to time for like periods upon payment of a renewal fee of ten dollars in each case.

§ 49. **Cancellation.** Any person deeming himself injured by the registration of a trade-mark in the Patent Office, may, at any time, make application to the Commissioner to cancel such registration. In such case an interference proceeding is conducted, in the same manner as noted above, and, if determined adversely to the registrant, his registration is cancelled (24).

§ 50. **Appeals.** An appeal lies from an adverse decision of the examiner in charge of trade-marks upon an applicant's right to register a trade-mark or to renew the registration of a trade-mark, or from a decision of the examiner in charge of interferences, to the Commissioner in person; and from an adverse decision of the Commissioner upon the right of an applicant to register a trade-mark or to renew the registration of a trade-mark, or from a decision of the Commissioner in cases of interference, opposition, or cancellation, to the court of appeals of the District of Columbia (25).

(24) Trade-mark Act, Sec. 13.

(25) Ibid., Secs. 8 and 9.

§ 51. **Assignment of trade-marks.** The Trade-Mark Act provides that a registered trade-mark, or a mark for which application for registration has been made, together with the application for registration of the same, may be assigned in connection with the good will of the business in which the mark is used (26). Such assignment must be in writing and duly acknowledged according to the laws of the country or state in which the same is executed. Any such assignment is void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from its date.

It will be noted that the act provides for assignments only in connection with the good will of the business in which the mark is used. This is in accord with the common law rule that trade-marks can be assigned only in such manner, the reason being that a trade-mark is analogous to the good will of a business, and can exist only in connection with the good will, and therefore cannot be separately assigned.

In Dixon Crucible Co. v. Guggenheim (27), it was said: "As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by assignment, or descend to a man's legal representatives," and in Bulte v. Igleheart Bros. (28) it was said: "A trade-mark is analogous to the good will of a business. Whoever heard of a good will being sold to one while the original owner continues

(26) Ibid., Sec. 10.
(27) 2 Brew. 321, 339.
(28) 137 Fed. 492, 498, 499.

the business as before; the good will is inseparable from the business itself." In MacMahon Pharmacal Co. v. Denver Chem. Mfg. Co. (29), the rule was stated to be: "A trade-mark cannot be assigned or its use licensed, except as incidental to a transfer of the business or property in connection with which it has been used. An assignment or license without such a transfer is totally irreconcilable with the theory upon which the value of a trade-mark depends, and its appropriation by an individual is permitted;" and in another case it was said that no one could claim the right to sell his goods as goods manufactured by another, as this would be a fraud on the public (30).

§ 52. **Notice to public.** It is the duty of a registrant to give notice to the public that a trade-mark is registered by marking it with the words "Registered in U. S. Patent Office," or "Reg. U. S. Pat. Off." (31). In any suit for infringement by a party failing so to give notice of registration, no damages can be recovered except on proof that the defendant was duly notified of infringement, and continued the same after such notice.

§ 53. **Registration prima facie evidence of ownership.** The registration of a trade-mark under the provisions of the act is prima facie evidence of ownership.

§ 54. **Infringement.** Any person who, without the consent of the owner, uses a reproduction, counterfeit, copy, or colorable imitation of any registered trade-mark,

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(29) 113 Fed. 468, 474.

(30) Whitthaus v. Braun, 44 Md. 303, 306.

(31) Trade-mark Act, Sec. 28.

upon merchandise of substantially the same descriptive properties, and in commerce among the several states, or with a foreign country, or with the Indian tribes, is guilty of infringement of such registered trade-mark, under the act (32). It should be noted that the act expressly confines cases of infringement to use in the commerce over which Congress has control; as the act purports to be, and is, merely a regulation of such commerce.

§ 55. **Importations.** The Act also prohibits the importation into the United States of any article which either copies or simulates the name of any domestic manufacture, or manufacturer or trader; or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States; or which copies or simulates a trade-mark registered in accordance with the provisions of the Act; or which bears a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured (33).

In order to aid the officers of the customs in enforcing this prohibition, it is also provided that such manufacturers or traders as are entitled to its protection may register their names and residences, the names of the localities in which their goods are manufactured, and copies of the certificates of registration of their trade-marks, with the Treasury Department, and may also furnish the Department with facsimiles of such names.

(32) Ibid., Sec. 16.
(33) Ibid., Sec. 27.

§ 56. **Interference of registered marks.** If two or more trade-marks, bearing such near resemblance to each other as is likely to cause confusion or mistake in the mind of the public or to deceive purchasers, are registered by the Patent Office, either through its failure to find an earlier registration upon the examination of a later one, or otherwise, any person interested in any one of them may have relief against the others by a suit in equity. In such suit the court may adjudge either of the registrations void in whole or in part, according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation (34).

In such a suit in equity to cancel the registration of an interfering mark, the issue ordinarily would be which party is the rightful owner of the mark, and this question would turn upon the fact of prior adoption and use by one party or the other, as above noted, and not upon the priority of registration; although the question of delay would also be considered, if raised.

§ 57. **Jurisdiction of courts.** The circuit and territorial courts of the United States and the supreme court of the District of Columbia have original jurisdiction, and the circuit courts of appeals of the United States and the court of appeals of the District of Columbia have appellate jurisdiction of all suits at law or in equity, respecting trade-marks registered in accordance with the provisions of the Act, arising under the present Act, without regard to the amount in controversy.

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(34) Ibid., Sec. 22.

This jurisdiction is not exclusive of the jurisdiction of the state courts to enforce rights in regard to trade-marks under the common law, or under state statutes; nor of the jurisdiction of the Federal courts on the ground of diversity of citizenship, or some other ground, sitting in the various states, to enforce such rights.

§ 58. **Remedies in law and equity.** In an action at law for infringement, under the Trade-Mark Act, whenever a verdict is rendered for the plaintiff, the court may enter judgment for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs (35).

The several courts vested with jurisdiction of cases arising under the act are also given power to grant injunctions to prevent the violation of any right of the owner of a trade-mark registered under the Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark, the complainant may recover, in addition to the defendant's profits, his own damages. The court may also increase such damages, in its discretion, in the same manner as in actions at law, noted above (36).

In assessing profits the plaintiff is required to prove the defendant's sales only; the defendant being required to prove all elements of cost which are claimed. In such a case, therefore, the plaintiff makes a prima facie case by proving the gross amount of the defendant's sales. The

(35) Ibid., Sec. 16.
(36) Ibid., Sec. 19.

burden of proof is then upon the latter to prove the amount of his expenses connected with such sales, and the difference between such amounts is the sum which may be awarded to the plaintiff.

§ 59. **Destruction of labels, etc.** In any case involving the right to a trade-mark registered in accordance with the provisions of the Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff, or complainant, or any reproduction, counterfeit, copy, or colorable imitation of it, shall be delivered up and destroyed (37).

(37) Ibid., Sec. 20.

RIGHTS IN LAND OF ANOTHER.

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INTRODUCTION.

§ 1. **Scope of article.** Property rights in land which accompany or entitle to possessory control over the land, and property rights in land held merely as security for the performance of some obligation or condition, are considered elsewhere in this work. See the articles on Landlord and Tenant elsewhere in this volume, and on Title to Real Estate and Mortgages in Volume V. In this article are discussed briefly certain large classes or rights in land which do not fall within either of these groups,

and may be called Rights in the Land of Another; and also certain other classes of rights against specific persons as possessors of land or of interests in land.

§ 2. **Use of land involves incidental use of neighboring land.** It is evident that no piece of land is used without the incidental use of neighboring land. Light and air come to every lot over other lots; each requires support for soil and buildings from others; any smoke, noise, odors, or vibrations originating on one piece affect neighboring pieces; water comes to and drains off from a lot over other land, subterraneously or on the surface, through natural channels, pipes, or ditches; each can be reached from other places only over intervening land or water. These are but a few of the ways in which the use of one piece of land often involves a concomitant use of another.

Also the use of land may affect detrimentally other land or its use. Brown, in excavating for a building foundation, causes the surface of his neighbor's lot to fall; Smith, in digging a well or in damming a stream, stops the flow of percolating water, or of the stream, to the farm of Hood; Scott starts a stock-yards in a city, and makes the land for miles around undesirable as residence property; the children of Thomas plague the neighbors by playing the pianola all day long.

§ 3. **Existence and acquisition of those rights of incidental use.** Of course it is impracticable and unnecessary for a person to own or possess all the land of which he may wish to make incidental or supplementary uses, or which his use affects. A right to use or to affect in lim-

ited ways usually may be acquired without possession or ownership, through agreement, for a compensation far below the value of the land, because the agreement would leave to the possessor of the burdened land the right to use it as fully as before, except in so far as abstention would be necessary to give the owner of the special right bargained for the full enjoyment of that right. Furthermore, a possessor of land may legally use other land incidentally with his own for many purposes and affect it in many ways, without agreement and without permission from the other possessor or owner. Between the potential conflicting claims of neighboring land-possessors concerning extralimital uses and effects, the law draws a line which leaves to each possessor certain restricted reasonably necessary rights and liberties to use and to affect neighboring land and the space above it.

The first chapter will be devoted to a consideration of this line. In the second we shall discuss principally certain additional rights and privileges in another's land, which may be obtained by land-possessors or others; and in the third chapter, we shall take note of some classes of special rights which may be created by agreement, and enforced against only successive possessors of a certain parcel of land—not against persons generally who may happen to infringe them.

CHAPTER I.

ORDINARY RIGHTS OF A POSSESSOR OF LAND IN THE LAND OF HIS NEIGHBORS.

§ 4. **Right of lateral support.** Obviously the law should forbid neighbors or others to injure the surface of a lot or tract by excavations beyond its boundaries. Therefore we find that a land-possessor has a right to insist that persons in general shall not cause the surface of his land to fall or sag, without contribution from artificial structures or operations on it, through withdrawing the support afforded by neighboring earth. The duty which this right involves is not satisfied by the exercise of the utmost care to prevent injurious results. Liability will exist even though unforseen subterranean conditions have contributed to the fall. Therefore, if Jones makes an ordinary excavation for a house and unexpectedly the adjoining portion of Smith's vacant lot falls into the hole because of some unknown peculiarity of its subsoil, Jones is responsible for the damage. This is so even though Jones has employed an independent contractor to do the work (1).

This burden of support lies not only on the adjoining lots, but on all land where excavation might be made, which would cause the prohibited damage. However, the burden owed with respect to a given lot ordinarily dimin-

(1) Cabot v. Kingman, 166 Mass. 403.

ishes as the distance from the lot increases. The liability for an injury of this sort falls on those who made the excavation, those who directed it, and the land-possessor on whose tract it was made, if he permitted it.

§ 5. **Subjacent support.** If one person owns the mineral deposits under a piece of land and another owns the rest of the land, the possessor of the surface ordinarily has a right of subjacent support from the strata of the minerals, similar to the right of lateral support which we have been considering. The miner, to avoid infringing this right, must leave sufficient ribs and pillars to support the surface, or must supply such support artificially.

§ 6. **No right of lateral support for buildings.** Suppose that Jones, the immediate neighbor of Smith, digs up to his boundary line so that Smith's house falls. Let us first assume that Jones has conducted his operations in a very careful manner and has given Smith notice of his intentions. If we assume in addition that no part of Smith's earth would have fallen had it not been for the structure upon it, Jones escapes liability. The ordinary right of a land-possessor to lateral support is satisfied by sufficient resisting force to maintain his *land* in its natural state. He himself must look out for additional support for his *buildings*.

This right of support is not a right to have the adjoining soil remain in its natural state, but is merely a right to have the benefit of support. The owner of the adjoining land may supply this support artificially, in place of the natural support.

Assuming now that the land of Smith would have fallen in its natural state because of the excavation, and that it would not have fallen because of the weight of the building if Jones had not dug excessively, Jones is liable for any damage to Smith's *land* caused by the excessive excavation and not enhanced by the weight of the buildings; but under the law of most American jurisdictions, probably his legal liability would not extend to the damage to the *buildings* (2). A few of our states, however, hold a contrary view.

§ 7. **Duty of excavator to use care: Notice.** Though the possessor of improved land has no right to demand sufficient support for his buildings from the land of his neighbors, he has a right to insist that operations on neighboring land shall be carried on with reasonable care and regard for the stability of both his land and his buildings. This is a right which must be kept quite distinct from the right of lateral support which we have been considering hitherto. It imposes no duty to leave any absolute measure of support to land or buildings; it merely requires reasonable care in action. Just what conduct will satisfy this legal demand for reasonable care, will depend upon the circumstances of the case. Ordinarily it will be prudent for the excavator to give notice to the neighbors of the nature and extent of his proposed operations. Neglect to give this notice *may* result in liability if damage occurs, provided the neighbor does not happen to have already the knowledge which the notice should

(2) Gilmore v. Driscoll, 122 Mass. 199. Compare Gildersleeve v. Hammond, 109 Mich. 431.

give (3). It is best to serve a dated notice in writing to all persons who may be affected, and to keep a copy.

§ 8. **Same: Shoring up adjoining land.** It is not a legal duty of the excavator to go to great expense to shore up a neighbor's land or buildings, except in so far as is necessary to furnish sufficient support for the land in its natural state. Generally speaking, the neighbor must look out for the stability of his own structures and the sufficiency of their foundations. Reasonable care on the part of the excavator would exclude, however, any superfluous endangering of the neighboring building by the method of excavation, though it would not prevent him from digging up to the division line.

§ 9. **Legislation.** In some of our states there are statutes modifying in some respects the common law on some of the preceding points in this chapter. Some of these statutes require notice of an excavation to be given adjoining owners. Some extend the duty of lateral support in favor of adjoining buildings in certain localities, if the excavation proposed is to be more than a certain depth, provided the owner of the adjoining land will give permission to the excavator to enter on his land for the purpose of providing the necessary security. The local statutes and ordinances should be carefully examined on these points.

§ 10. **Light and air.** A right to have light and air come to his land over that of his neighbor is not included among the ordinary rights of a land-possessor. Jones, owning land entirely surrounding that of Smith, in the

(3) Shultz v. Byers, 53 N. J. L. 442.

absence of some special right obtained by agreement or prescription by Smith or his predecessors in title, may so enclose Smith's lot with buildings as to shut off all light and fresh air from Smith's house, without committing any legal wrong against Smith. If Smith's house completely covers his lot, Jones, by building close along his side of the boundary lines, legally may wall up Smith's windows.

The land-possessor has, however, some rights concerning light and air against his neighbors and others as well. To pollute the air passing to his land, rendering it unwholesome or making it unreasonably unpleasant is a violation of his rights. In the case of mere unpleasantness, there is no legal wrong, if such a condition of the air is a reasonably necessary effect of the uses to which the neighborhood is devoted. Also, it is a legal wrong so to affect the light passing to a lot as to make it harmful or unusually annoying to occupants—as, for instance, by dazzling reflections from a mirror-like surface.

§ 11. **Protection of comfort: Ordinary annoyances. Esthetic tastes.** Every possessor of land must put up with some inconvenience and unpleasantness from the use of the lots of his neighbors; especially is this true in a large city. An ordinary amount of smoke blowing from properly constructed chimneys; the ordinary noises of domestic and business occupations; the cries and play of children; the shutting of gates and doors; singing and instrumental music, now and then—such incidents of life in a thickly settled neighborhood must be endured without legal redress, if, indeed, they are found annoying and

cannot be avoided by the sufferer. Furthermore, the law does not protect the possessor of land from shocks to his esthetic sensibilities by imposing duties on his neighbors to respect them in the use of their land. Brown may build a house of execrable architecture and color next to Gray's handsome residence, and thus perhaps cause a considerable decrease in the market value of Gray's property without transgressing the dictates of the law. Brown's son may at intervals, to the despair of Gray, who is a musician, play wretchedly the most untuneful ragtime and keep well within the bounds of legal duty.

§ 12. **Same: Unreasonable disturbances.** However, such loud and discordant noises, not reasonably necessary, as cause physical discomfort to an ordinary person, cannot be persistently made without violation of the rights of neighbors. Nor can noises, not very unpleasant in themselves, legally be made so continuously or at such unreasonable times as to interfere with ordinary comfort. For instance, the deafening blast of a steam whistle given frequently without purpose, would be a good basis for legal complaint; so also would the constant barking of a neighbor's dog at night; or any other unnecessary frequent noise caused by the neighbor and preventive of peaceful slumber.

§ 13. **Same: Criterion of reasonableness.** In determining whether something complained of is an illegal nuisance to the physical comfort of a land-possessor, the courts consider its natural effect upon a person of ordinary sensibilities and health. If it would not affect such a person, it is not a legal nuisance, although the plaintiff

may have been very seriously troubled by it. For instance, in a case decided by the supreme court of Massachusetts (4), the facts were that plaintiff was suffering from sunstroke and was thrown into convulsions by the ringing of a church bell by defendant near plaintiff's house. Defendant had been told of the probable consequences of ringing the bell, but continued nevertheless. The court held that there was no legal wrong shown, as defendant's act would not have affected a normal healthy man at all. Plaintiff should have been taken to a more secluded spot if he wished to avoid the ordinary noises of city life. An instructive case to compare with this is Davis v. Sawyer (5), also a Massachusetts decision, in which factory proprietors were enjoined from ringing a bell calling their employees to work early in the morning, because it consistently interfered with plaintiff's sleep. The instruments of industry cannot be stopped as violating legal rights merely because they happen to interfere with the comfort of the sick or infirm of the neighborhood; but they must not be used without reasonable regard to the ordinary comfort of normal healthy persons.

§ 14. **Same: Justification of neighborhood.** Though a condition produced by the use which a neighbor is making of his land is very annoying and uncomfortable to normal healthy persons, the production of it nevertheless may constitute no legal wrong. One of two common justifications may exist to bring the situation within the bounds of right.

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(4) Rogers v. Elliott, 146 Mass. 349.

(5) 133 Mass. 289.

If the condition is not destructive of health, and is only an ordinary effect of a use of the sort to which the neighborhood is devoted, it furnishes no valid legal cause of complaint. For instance, the rumbling of factory machinery on land next to Chase's may cause great annoyance to him. If his home is on his lot, the noise of the factory may render it wholly uncomfortable; or if he carries on some mercantile pursuit, the factory may seriously interfere with it. Nevertheless, if the neighborhood is devoted to manufacturing or to equally noisy uses, and if Chase's neighbor is adding no new element to the ordinary annoyances of the neighborhood, Chase's rights are not violated. If he is not satisfied with his location, he should move elsewhere and put his lot to more congenial uses (6). But this justification that the annoying use is being prosecuted in a proper neighborhood is of no avail if the particular effects of which Chase complains are not of a sort ordinary in the neighborhood. In a recent English case, Polsue v. Rushmer (7), the facts were: Defendants had established a printing machine in a house adjoining plaintiff's residence. The district was devoted to the printing and allied trades. The operation of the defendants' machine did not appear to be unreasonable as compared with that of other machines in the neighborhood; but defendants ran their machine at night, and the trial judge found that this caused a new disturbance and a substantial increase of plaintiff's discomfort. The House of Lords affirmed a decision in

(6) Gilbert v. Showerman, 23 Mich. 448.

(7) [1906] 1 Ch. 234; [1907] App. Cas. 121.

favor of plaintiff on the ground that this was a new burden upon plaintiff's enjoyment of his property.

§ 15. **Same: Justification of public authority.** The other common justification is particular public authorization. Legislation constitutionally may legalize many things that otherwise would constitute actionable nuisances. For instance, after the decision of Davis v. Sawyer (§ 13, above), the legislature passed a statute authorizing manufacturers and others to give notice to their employees by ringing bells or blowing whistles in accordance with a written license previously obtained from the town authorities. The defendants in Davis v. Sawyer thereupon obtained a license to ring their bell as they had previously done and commenced proceedings in court to have the injunction decreed against them in that suit dissolved. In Sawyer v. Davis (8) the state supreme court held that the law was constitutional and that on the case presented the injunction should be dissolved. Another instance of the effect of governmental authorization is afforded in the case of railroads. Many of the incidents of railroad operation which otherwise would constitute actionable nuisances to land-possessors in the neighborhood of the right of way may be rendered legal by the fact that the government has specifically authorized the operation.

§ 16. **No right of way for passage, pipes, ditches, or wires across neighbor's land.** A land-possessor has no right or liberty of passage across the lands adjoining his, even though he has no other means of ingress and egress

(8) 136 Mass. 239.

to and from his lot, unless he or his predecessors in title have secured such a way through grant, agreement, prescriptive user or otherwise. In the absence of such an acquired right, to infringe his neighbor's boundary line without permission is to commit an actionable wrong. Neither has he, independently of prescription, grant, devise, agreement, etc., any right to lay pipes or dig ditches or string wire across the land of his neighbors or to use pipes, ditches, or wires already there. He has no right of drainage across neighboring land except through natural water-courses (see § 21, below), and, in some jurisdictions, for surface water over lower lands according to the natural conformation of the ground.

§ 17. **Right of drainage for surface water.** In jurisdictions where the right to have surface water flow off over lower lands in a natural way is recognized, the possessor of the lower land commits a legal wrong if he prevents this natural drainage, except that he legally may interfere with it in the reasonable course of improving a town or city lot. The possessor of the upper land may accelerate and even perceptibly increase the flow by filling in depressions on his own lot, but he commits a wrong if he gathers the water in large quantities and discharges it at one place onto his neighbor's land with harmful results. This is sometimes called the civil law rule.

In some of our jurisdictions this right of natural drainage for surface water does not exist. In these jurisdictions each land-possessor legally may permit or even accelerate within reasonable limits, the natural flow, as indicated above; but, on the other hand, the lower possessor

is not bound to receive the water. He may erect barriers preventing it from passing his boundary line, and, though this results in a flooding of the upper land, he is within his rights. This is sometimes called the common law rule. In Bates v. Smith (9), an owner of a lot just below a parish burial ground had erected a barrier to prevent the flow of surface water over his lot from those adjoining. The result was that the burial ground was flooded by the accumulation of surface water upon it and some tombs were threatened with inundation. The members of the parish committee thereupon made an opening through the barrier to drain the burial ground. It was held that this was a wrongful trespass on their part, since the possessor of the lower lot had a right to keep the water off his lot by the embankment although this caused flooding of the land above. If the facts of this case had occurred in a jurisdiction where a right to surface drainage in the upper owner is recognized, the decision would have been different.

§ 18. **Percolating water.** The use and benefit of water percolating underground may be a very valuable incident of the ownership of land. It is evident that this use may be interfered with by the operation of persons possessing other land through which the water takes its course. For instance, the possessor of a tract can sink wells and by means of strong pumps draw the subsurface water from a large area of the surrounding country. This was done by Brooklyn in a farming district outside the city in 1885 and 1894. Various suits by possessors of land in the vi-

(9) 100 Mass. 181.

cinity followed. One of these, Forbell v. New York (10), brought by the lessee of certain farming lands, for damage to his crops and to the land for farming purposes through diminution of the moisture in the soil, is a leading case on the law of percolating waters. It was held that the city was making an unreasonable use of the water, from the standpoint of the conflicting claims of all concerned, with damaging results to the plaintiff which it might have anticipated, and that therefore it was liable. The so-called doctrine of "reasonable user" of percolating waters for which this case stands seems to be finding favor with the courts of our jurisdictions. However, the decisions that have been made concerning this reasonable user leave so much of the law of percolating waters undetermined and indefinite that a satisfactory statement of it is impossible. Following is some indication of what has been settled.

§ 19. **Same: Right of reasonable use. Examples.** In most of our jurisdictions at least, a person commits a wrong by *drawing off* percolating waters from land without any reasonable excuse and thus interfering with the use of the land or a legitimate use of the water. In some, if not all, of these jurisdictions, the same is true if the water is *diverted from flowing in its natural course to the land* unreasonably, with resulting similar interference. What would be a reasonable excuse and what an unreasonable diversion or withdrawal is left indefinite in most particulars; and perhaps ultimately we shall have

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(10) 164 N. Y. 522.

variant definitions of these phrases by decisions in different states.

If the interference complained of is for the purpose of collecting the water and using it in ordinary quantities on the lands on which appropriation takes place, although damage results to another land-possessor from loss of the water, there will be no legal wrong committed, no matter in what jurisdiction the facts occurred. We should have such a case if Jackson dug a well on his land near that of James to obtain a supply of water for his house, thus causing James's well to become dry. Even foresight on the part of Jackson that his well would destroy that of James would not make his act wrongful; nor would ill feeling towards James, provided that Jackson's real purpose was to get a supply of water for his own use and not merely to injure James. On the other hand, use of the water in great quantities off the land on which it was collected—as, for instance, by a water company selling it to others (11)—or, a fortiori, wanton waste of the water, would be without the limits of reasonable use in at least most jurisdictions.

If loss of the water to others is caused by the ordinary improvement of the defendant's land, there is no wrong chargeable against the defendant on account of the loss, unless it is an unnecessary result of the improvement and is caused by carelessness. If, for instance, mining operations in upper land necessarily cause a diversion of percolating water from lower agricultural land, there is no

(11) Katz v. Walkinshaw, 141 Cal. 116.

violation of right, though much damage results to the farmers.

§ 20. **Same: Unreasonable use not illegal in some states.** In some jurisdictions apparently the law gives no rights whatsoever in diffused percolating water to the possessor of the land containing it, as against persons intercepting and diverting the flow by operations on other lands. Where this is the case, a land-possessor may render useless his neighbor's valuable water works (12) and destroy the fertility of his land, perhaps, by diverting percolating water on upper land and letting it run to waste, without legal responsibility to his neighbor. In a few other jurisdictions, the only legal check on the power of the diverter to accomplish such results seems to be the existence of a legal duty not to damage his neighbor by maliciously or wantonly misusing the percolating water.

§ 21. **Natural water courses. Underground streams.** A natural water course is a stream flowing permanently or regularly at intervals along a definite channel, having a bed and banks or sides. In natural water courses, a possessor of land along the bank has certain rights enforceable against the world in general. He has a right to insist that no one shall dam the stream or cause its waters to flow back, or accelerate or diminish its flow past his land, in any way which will interfere materially with an ordinary reasonable use of the stream by him, or cause damage to or flooding of his land; except that he cannot complain of an interference with the use of the stream, if it is the reasonably necessary result of the use of an-

(12) Mayor of Bradford v. Pickles, [1895] A. C. 587.

other riparian proprietor, which is a fair one, having regard to the interests of all concerned. He has a right to drain into the stream from his riparian land, within the capacity of the channel. He has a right to exhaust the stream if necessary to water the cattle and horses and other domestic animals, and supply the domestic needs of the people upon his riparian land. He has a right to make such other uses of the stream, in connection with his riparian land, as will not materially and unreasonably interfere with ordinary uses by other riparian owners, or cause damage to other land. Generally a use which affects the stream materially is illegal, unless it is related to the use of riparian land. He commits a wrong to lower riparian possessors along the stream if he causes injurious pollution of the stream to an unreasonable extent, or not as a necessary incident to some reasonable use of the stream.

This is a rough statement of part of the complex law of riparian rights in our eastern, and some of our western states. In our arid western states there are rights, obtainable by and against riparian owners and others, through prior appropriation, to the use of the waters of a stream to the extent of certain volumes of flow. These rights are treated in the article on Irrigation Law in Volume V of this work.

§ 22. **Underground streams.** A land-possessor has rights, duties, and liberties with respect to ascertained underground streams flowing through his land similar to those in water courses on the surface. He commits no

wrong in interfering with the flow of an unknown subterranean stream accidentally.

§ 23. **Artificial water courses.** In private artificial water courses that may exist or be made across the land of others, a land-possessor has no rights except those founded upon some grant, agreement, devise, or prescriptive user. His rights to use such a water course crossing another's land would be an easement—a right of the sort discussed in Chapter II, below.

§ 24. **Termination of natural rights of a land-possessor.** The rights and duties discussed in this chapter, as well as other property rights generally, may be modified or abolished by grant, or by written agreement conforming to the requisites for a valid contract between the parties concerned, or by prescriptive adverse user or interference, in accordance with the principles of the law of prescription discussed in the article on Title to Real Estate, §§ 161-71, in Volume V of this work.

§ 25. **Same: Estoppel.** Also a land-possessor may lose one of his natural rights as against a certain person or the successive possessors of a parcel of land, by permitting permanent changes to be made off his land which will interfere with the continued exercise of the right. For instance, if one riparian owner gives permission to another to drain the stream or to divert its flow permanently, above the licensor's land, he cannot after the change is made get legal redress for its permitted effects; nor can he insist upon a restoration of the former flow. Likewise, if a land-owner gives permission to the owner of an adjoining lot to make a permanent excavation in

such a way as to withdraw the lateral support due his land, he cannot after the excavation is made insist upon the restoration of the support. In all these cases the natural right is gone, as against the licensee land-possessor and his successors, by what is technically called estoppel.

In cases similar to those just discussed, with the difference that the work causing the change is done on the licensor's own land, the natural right interrupted cannot be enforced if a consideration was given with the view to its abolishment at the time of the giving of the license (13), and, in some jurisdictions, even if no such consideration was given, but there has been great expense by the licensee or great damage will be caused to him as a net result of the transaction if the right is enforced (14).

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(13) Devonshire v. Elgin, 14 Beav. 530.

(14) Clark v. Glidden, 60 Vt. 702. Contra: Crosdale v. Lanigan, 129 N. Y. 604.

CHAPTER II.

PROFITS. EASEMENTS. LICENSES.

§ 25a. **Outline of chapter.** In addition to the ordinary rights of a land-possessor discussed in the preceding chapter, rights to use another's land without possession may be obtained by land-possessors or others, through grant, agreement, devise, prescription, or condemnation in exercise of the power of eminent domain given by the state. Those of such rights as can be enforced not merely against particular persons, but against the world in general, are dealt with in this chapter. They are divisible superficially into two classes. One of these classes may be called Profits a Prendre and the other Easements, provided we use "easements" in a common, but a much broader sense than the technical definition of the word would justify. We shall also discuss in this chapter a class of restrictions on the use of another's land, resembling legal easements and called Equitable Easements, and a class of liberties, rather than rights, in another's land, due to the permission of that other and called Licenses.

Section 1. Profits a Prendre.

§ 26. **Definition of profit a prendre.** A profit a prendre exists whenever a person, without possessing a certain plot of land, has a right, enforceable against the world in general, to enter and to take from it some part of the

earth, the minerals, or the vegetable products, or to hunt or fish upon it.

Some profits a prendre must be carefully distinguished from superficially similar possessory rights in a portion of a plot of land. For instance, a land-owner may convey to a person the minerals in his land with expressed or implied accessory rights of entrance and egress over and through the remainder of his land for the purpose of extracting them. By such a conveyance there would pass not only a right to enter and get the minerals, but ownership and possession of the minerals in place. This, then, would not be a profit a prendre. If the right given to take minerals is a profit a prendre, no possession or ownership of the minerals will accrue to the grantee until they are taken. Likewise, standing trees may be conveyed as part of the land; or a profit a prendre to enter and to cut down and carry away trees may be given.

§ 27. **Rights to hunt and fish.** A right, good against the world in general, to fish or to hunt wild game on private land, if the game or fish run unrestrained, can be granted by the owner of the land only as a profit a prendre; for under our law, no private person can have ownership of wild animals, running at large, in the possession of no one.

§ 28. **Rights of pasture.** A right, enforceable against the world in general, to pasture cattle, horses, or other animals on another's land, is perhaps the most usual profit a prendre.

§ 29. **Duration of profits.** Profits a prendre may be created for a term of years, or for the life or lives of a

certain person or persons, or as inheritable interests in land.

§ 30. **Profits appurtenant.** A profit a prendre may be held by the possessor of a parcel of land, other than that in which the profit exists, for use accessory to the uses of the parcel possessed. In such a case, it is said to be appurtenant to the parcel possessed, and the right will follow the possession of the benefited land, and cannot at the will of the owner of the profit be granted away separately, as an independent right. The land which is benefited by such a profit is called the "dominant tenement." The land that is burdened by *any* profit is called the "servient tenement."

Let us have an example of a profit appurtenant. Andrews, the owner in fee simple of farm A, grants to Brown, his neighbor, who owns in fee simple the adjoining farm B, "his heirs and assigns," a right to pasture the cattle kept on farm B, on the pastures of farm A, and also to take necessary firewood for the purposes of farm B from the woods of farm A. In this case we have two profits a prendre appurtenant to the dominant tenement B, and burdening the servient tenement A. The profits will pass as accessories to farm B, as long as they respectively exist, to the successors of Brown in the possession of B. If the conveyance is properly recorded, the burden will attach to farm A in the hands of the successors to the possession thereof.

§ 31. **Profits in gross.** A profit a prendre held for use independent of the possession of any given parcel of land by the owner of the right is said to be held "in gross."

A profit a prendre in gross may be transferred freely by its possessor.

§ 32. **Methods of creating profits a prendre.** A profit may be created by a deed of grant (a deed requiring a seal), or, under the statutes of some of our states, by a written instrument without a seal. It may be created by devise. It may also arise from prescriptive user, in accordance with principles discussed in the article on Title to Real Estate, §§ 161-71, in Volume V.

A mere agreement that such a right shall exist will not technically create a profit a prendre, but if the agreement is in writing, and a consideration for it is given, it will be specifically enforced in a court of equity against all who had notice of the claim for the existence of the profit, or who are mere volunteers and will not lose by its enforcement. The practical result is that such an agreement generally creates an equitable profit a prendre which differs from a legal profit a prendre only in the matter of the technical processes for enforcing it, and in the fact that even if the agreement is recorded, the right will not be good against persons who give value, who have no actual notice of the right, and to whom the record, under the recording acts, does not give constructive notice. Persons, including the state and those specially authorized by it, having eminent domain rights, may acquire profits a prendre and easements through condemnation proceedings within the scope of their authority.

§ 33. **Termination of profits a prendre.** The holder of a profit a prendre may release it to the possessor of the servient tenement by a deed, or in some states by an un-

sealed written instrument. An agreement for a release upon consideration will be specifically enforced if the statute of frauds is complied with. A profit may also be terminated by prescriptive, uninterrupted interference with the user by the possessor of the servient tenement, in accordance with principles discussed in the article on Title to Real Estate (see reference in § 32, above). In some jurisdictions, a profit acquired by prescription may be lost by mere non-user for the length of time necessary for the acquisition of a prescriptive title.

If the dominant and servient tenements come into the possession of the same person or group of persons, the profit will be at least suspended, since no one can have a profit a prendre or an easement in land which he himself possesses; and unless an injustice would thereby be done to the holder of some future interest in the dominant tenement, the profit will be completely destroyed. When thus suspended or destroyed, a profit will not be revived by a separation of the possessions of the dominant and servient tenements through conveyance, descent, devise, or adverse possession.

A profit a prendre may also be terminated by what is technically known as estoppel against its owner. If the owner of the profit voluntarily leads the servient owner to believe that it is his intention to give up the profit, and the servient owner thereupon makes some change in the servient tenement which renders impossible the continuance of the profit, or renders its continuance a new hardship to him, the owner of the profit will be "estopped from asserting its existence"—that is, legally, it will be at an

end. Such a case would arise if Jones, having a right of pasture on Smith's land, or a right of fishery in Smith's pond, should give permission to Smith to build upon the pasture, or to permanently drain the pond, and Smith should act in accordance with the permission.

Section 2. Easements.

§ 34. **Definition of easement.** The word easements, as we shall use it in a broad sense, includes rights, good against the world in general, to use a certain parcel of land without possession; and rights, enforceable against the world in general, to restrict some use of another's land or its incidents for the benefit of some property of the holder of the right. There are numerous sorts of easements. We shall examine only some of the more ordinary; but thereby we shall obtain an idea of the legal principles concerning easements in general.

Before taking up the discussion of particular types of easements, it is well to state a few facts which apply to easements generally.

§ 35. **Creation of easements.** An easement may be created by grant, by prescription, by devise, by agreement, or through condemnation in the exercise of eminent domain rights. What has been said above concerning the creation of profits a prendre applies to the creation of easements and need not be repeated here (§ 32, above).

§ 36. **Easements appurtenant.** If an easement is created for accessory benefit to a land-possessor in the use of a certain parcel of land, it is said to be appurtenant to that land. The statements that have been made (§ 30, above), concerning profits appurtenant, apply to ease-

ments appurtenant. If there is an easement or a profit appurtenant to a piece of land, it will pass with the land upon any conveyance or devise, although not mentioned in the instrument of transfer. For instance, if Jones, owning a city lot with an appurtenant right of passage-way over a private alley running across his neighbor's lots, conveys his lot to Smith without mentioning the way or any appurtenance, Smith gets the easement over the alley nevertheless as one of the benefits permanently attached to possession of the lot.

§ 37. **Easements in gross.** There is some discussion in text-books upon easements as to whether properly an easement in gross is a possible interest in land. There is no doubt that rights in gross which come within our definition of easements may exist in all jurisdictions—for instance a railway company's right of way over land not owned by it. However, there is a question whether rights to use another's land without possession for merely private purposes may exist in gross in some jurisdictions. They may at least in most jurisdictions.

It seems, however, that in some of the jurisdictions where they are recognized, they are not transferable or transmissible rights, but can be used only by the person to whom they are first granted or devised, or who obtains them by prescriptive user, or, generally, by his servants and agents. In other jurisdictions, however, such a right in gross may be transferred, and if, by the terms of its creation, it is to last long enough, it may pass to the heirs or personal representatives of a person who dies possessed of it. Compare § 31, above.

§ 38. **Extent of easements: Conventional easements.** The extent of an easement created by grant, devise, or agreement is determined from the terms of the instrument and the circumstances under which it was made. Sometimes it is a very difficult matter to ascertain the proper scope of an easement. For instance, if a way is created appurtenant to a certain lot, it may be hard to determine from the instrument of creation whether it was intended that it should be a way for carriages as well as foot passage, and whether it should exist only for such purposes as were incident to the use of the lot at the time of the creation of the easement, or also for additional purposes arising from new uses of the dominant tenement (1).

§ 39. **Same: Prescriptive easements.** The extent of an easement created by prescription is determined from the scope of the claim of right to use indicated by the nature and extent of the user during the prescriptive period. It is sometimes a difficult question, usually one for the jury, to determine in detail the extent of this claim of right. Cases arising over claims of prescriptive rights of way are good illustrations.

Ballard drives a cart along a certain course over Dyson's adjoining land to the highway whenever he goes to market. Sometimes the cart is drawn by a horse, sometimes by an ox. Ballard's predecessor in possession was accustomed to drive hogs to the slaughter-house over the same way. These uses have continued more than

(1) See Allan v. Gomme 11, A. & E. 759; Newcomen v. Coulson, 5 Ch. Div. 133.

twenty years without objection on the part of Dyson or his predecessors in the possession of the adjoining lot. Ballard now claims a prescriptive right of way, broad enough to permit him to drive oxen to the slaughter-house. The question is whether the claim of right under which the prescriptive user of the way was evidently made, included such a use within its scope.

Higginson claims an easement of way by prescription, broad enough to include a right to cart coal to market from a little marl field across the land of Cowling. A prescriptive way for farming purposes is conceded to him by Cowling, but, inasmuch as neither Higginson nor his predecessors in the possession of the little marl field have ever used the road for carting coal, Cowling denies that this use is included within the scope of the easement. No coal had been mined on the little marl field for over seventy years until recently.

It was held in the two English cases (2) involving the sets of facts contained in the two preceding paragraphs that it was a question for the jury to decide whether or not the prescriptive claim of right justified the use claimed by its owner; and it was intimated that a verdict either way would have been sustained by the court on the evidence. It is to be observed that in neither case had the use contended for been made within the prescriptive period. In both cases, however, the prescriptive user had been broad enough to justify the inference of an apparent

(2) Ballard v. Dyson, 1 Taunt. 279; Cowling v. Higginson, 4 M. & W. 245.

claim of right to use generally, for all ordinary purposes of a roadway.

§ 40. **Effect of excessive use by owner of easement.** If the owner of an easement uses the servient land in a way not within the scope of his right, he becomes a trespasser. For instance, if the eaves of Brown's house overhang Black's land, and Brown has an easement appurtenant to his lot to have them so overhang and to have the water from them drip onto Black's lot, he may not extend the eaves farther over Black's land, or alter his building so as materially to increase the flow of water from the eaves, without becoming a trespasser; but he may merely raise the eaves without exceeding his rights (3).

Even though it becomes impossible to exercise an easement according to its terms, the owner of it will not be entitled to use the servient land otherwise than in strict accordance with them, unless the impossibility is due to the fault of the servient possessor. For instance, if a private way becomes impassable from storms or lack of repairs the owner of the easement has no right to deviate from it and pass the obstruction over the adjoining land of the servient possessor (4). However, members of the public finding a public way impassable may pass the obstruction over lands adjoining the road if there is no other reasonably convenient public way to get to the destination (5).

§ 41. **Repairs and improvements in aid of easements.** The possessor of the servient land is under no obligation

(3) Harvey v. Walters, L. R. 8 C. P. 162.

(4) Taylor v. Whitehead, 2 Doug. 745.

(5) Campbell v. Race, 7 Cush. (Mass.) 408.

to make repairs or alterations in order to facilitate the exercise of an easement, merely because of its existence. However, he may have covenanted or in some other way incurred an obligation to do so. If the owner of the easement wishes repairs or alterations made, he may make them himself.

§ 42. **Subsidiary uses within scope of easement.** An easement often includes within its scope uses of the servient land subsidiary to the main one contemplated at the time of its creation. For instance, the owner of a way to a warehouse may leave goods, brought to or from the warehouse, upon the servient land for a reasonable time preliminary to loading or storing in the warehouse. He would be guilty of a trespass, however, if he deposited the goods upon the way in lieu of storing them in the warehouse, or if he caused unreasonable inconvenience to other legitimate uses of the land in his methods of loading, unloading, or delivering for storage (6). The owner of an easement clearly also has the right to enter upon the servient land for the purpose of making repairs or improvements to facilitate his legitimate uses of the land.

§ 43. **Rights of use of servient possessor.** The owner of the servient land may make such uses of it as do not unreasonably interfere with the legitimate uses of the possessor of the easement. Naturally, the value of these remaining possessory rights of user will vary greatly with the nature and extent of the easement. For instance, a right of foot-passage across a field in the country would not prevent the possessor of the field from putting his

(6) Appleton v. Fullerton, 1 Gray (Mass.) 186.

cattle to graze along the path or from fencing it in by removable rails at the ends (7). On the other hand, if a broad roadway is granted for all purposes as appurtenant to a plot of land used for a large fashionable summer hotel and it is macadamized by the dominant owner, evidently barriers across the road which would delay the passage of automobiles would not be justifiable, and its value as a grazing ground for cattle would be destroyed. However, the possessor of the servient tenement rightfully might use the road for passage in any way and to any extent that would neither materially interfere with the legitimate uses of the dominant owner, his licensees, his servants and agents, nor damage the pavement (8).

§ 44. **Termination of easements.** An easement may be terminated in the same manner as may a profit a prendre (§ 33, above). In addition, an easement may be lost by a cessation of use if the holder concomitantly gives unmistakable evidence that he wishes to give it up, although the servient owner does not afterwards act upon the representation in such a way as to raise an estoppel against the former holder of the easement.

Let us now consider some of the ordinary types of easements.

§ 45. **Public ways.** No land can be used without a means of access and egress over other land or water. We find striking evidence of the truth of this axiomatic statement in the existence of the public streets gridironing a town or city. Sometimes the land covered by a

(7) Bakeman v. Talbot, 31 N. Y. 366.

(8) Herman v. Roberts, 119 N. Y. 37.

public road or street is owned by the state or some municipal division thereof; but frequently the land of a street or road is owned by the owners of the lots or tracts abutting upon it, and the public have what may loosely be called an easement of passage. In either case, individual members of the public have no property rights in the street or road except as abutting land owners. The rights of passage they have are untransferable.

§ 46. **Same: Rights when fee is in abutting owners.** When the land of a street or road is owned by the abutting landowners, each has ownership of the land usually to the center of the street, but sometimes to a less or greater extent as the conveyances in his chain of title may indicate. This gives them, in addition to the technical possession of the land covered by the street within their boundaries, whatever slight use of the land and control over uses may be exercised without conflicting with the public use for street purposes. Particularly they have rights to light, air, and access from this portion of the street, except in so far as these may be interfered with by its use for legitimate street purposes. In Perley v. Chandler (9) it was decided by the supreme court of Massachusetts that the possessor of land over which ran a public highway had a right to maintain a water course under and across the highway for the purpose of supplying his mill with water. In Codman v. Evans (10) the following facts were involved: Defendant's bay-windows projected over land of which plaintiff was the

(9) 6 Mass. 454.

(10) 5 Allen (Mass.) 308. See also State v. Davis, 80 N. C. 351.

possessor, but over all of which ran a public way. It was held that the defendant was a trespasser on the plaintiff's land and was liable to him in damages. This second case is a good illustration of the rule that the possessor of the servient land may obtain legal redress against any one who uses the land in a way beyond the scope of the easement over it.

§ 47. **Same: Rights when fee is in state.** If the fee of the street is owned by the state or some municipal division thereof, an abutting landowner has no possessory interest in it. It has been held in many jurisdictions, however, that he has certain rights of light, air, and access over the street, in the nature of easements, which are subordinate only to the necessities of the public use of the street, for legitimate street purposes (11).

§ 48. **Same: What are legitimate street uses?** What are legitimate street uses, is a question that has given trouble to the courts in suits by abutting property owners, who claimed that some such use as that of a telephone company, or an electric or elevated railroad was an additional burden upon their servient owner's interest in the street, or an unwarranted interference with the use of their easements of light, air, and access therein. Questions of this nature were involved in the famous New York Elevated Railroad cases (12). It was held by the courts in those cases that an elevated railroad was not within the limits of the legitimate street purposes for which the land was originally acquired by the city, and

(11) Adams v. Chi., B. & N. R. Co., 39 Minn. 286.

(12) Story v. N. Y. El. R. Co., 90 N. Y. 122.

the railroad company had to pay the abutting owners for the permanent additional damage done to their abutting property.

Sewers, drainage, water, and gas supply pipes clearly may be classed as legitimate street uses, if they are for service to the public of the municipality in which the street or highway lies. A steam railway is not a legitimate additional burden (13). Telephone and telegraph lines have been held legitimate uses in some states, and not in others. It has been held quite generally that a city has the right to change the grade of a street, although the light, air, and access of the possessors of abutting land are thereby impaired (14). The subject matter of this subsection is more fully treated in the article on Constitutional Law, §§ 219-20, in Volume XII of this work.

§ 49. **Same: Some interference with user of public is legitimate.** A possessor of land abutting on the street may to some slight extent rightfully interfere with the use of the public. For instance, he may place skids over the sidewalk for the purpose of removing boxes or other heavy articles, to or from trucks in the street, provided he does not leave them there unreasonably long (15).

§ 50. **Same: Dedication.** When a street is not established by condemnation, usually it is opened by dedication. The mode of accomplishing this is discussed in the article on Title to Real Estate § § 130a-132a, in Volume V.

(13) Williams v. N. Y. C. R. Co., 16 N. Y. 97.

(14) Roberts v. City of Chicago, 26 Ill. 249.

(15) Welsh v. Wilson, 101 N. Y. 254. Cf. Callanan v. Gilman, 107 N. Y. 360.

It gives the public merely what may be called an easement for the specified purposes, leaving ownership and possession of the land unchanged. Statutory dedication in some states passes the fee.

§ 51. **Railways.** Railroads sometimes own the land over which their right of way runs, but more frequently, they have merely a right of passage, for railway purposes—that is, an easement over it. When a railroad has merely an easement for its right of way, whosoever is owner of the land, generally one of the abutting owners, has technical possession of the land covered by the easement and a right to use it for any purposes which will not interfere with reasonable railway uses. For instance, he may cultivate such part of the land between the railway fences as is not covered by tracks or structures or put to any other easement use by the railway company. Generally, however, the railroad uses are such as practically to exclude all use by the possessor of the land, except sometimes drainage; but the land-possessor has still the very important right to restrict the railroad company to reasonable railroad uses. Any other use of the land on the part of the company would be a wrongful trespass against the land-possessor. Whenever the use for railway purposes is permanently abandoned, the land-possessor holds the land free from the easement which is extinguished.

Unless by charter or statute, a railroad company or any other private corporation or person having eminent domain rights, can not usually acquire by condemnation any more than a profit a prendre or an easement over

land, if one of these incorporeal rights is reasonably sufficient for its or his purposes. Therefore, if a railroad company wishes to own the ground over which its tracks are to run, it must frequently obtain it by some other means than through exercise of its eminent domain rights.

§ 52. **Private ways.** Sometimes a land-possessor requires other means of access to his land than are afforded by public ways; especially is this true in the country. The necessary additional road or path may be obtained through a grant of a private right of passage over his neighbors' land; or a prescriptive user may have ripened into a right for such a way. However it is obtained, the easement will have certain limitations which must be regarded by its owner. The way will be over a more or less clearly defined course which must be followed. Likewise, it must be used only for the purposes for which the easement was created. If A has a right to drive cattle over B's ground to Blackacre and drives his beasts to Whiteacre lying beyond Blackacre, he is a trespasser, because his easement did not entitle him to use the way for the purpose of getting to any other place than Blackacre (16). That the way terminates at a highway will not necessarily entitle the owner of the easement to go wherever he pleases after reaching the highway. If the highway is the destination contemplated in the creation of the easement, he may do so; but if the destination is a particular spot beyond the highway, as for instance lot X, or a particular place to which the highway leads, for instance a market place, the private way can legitimately

(16) Howell v. King, 1 Mod. 190.

be used only to get in the one case to lot X, and in the other case to the market place as a destination. In these cases, if the owner of the way goes first to the proper destination of the easement, and, having finished his business there, goes elsewhere along the highway, there is no trespass, since the way has been used for a proper and accomplished purpose.

If there is an easement of way appurtenant to Nineacre field over the land of Williams to a public highway, and James, who possesses both Nineacre field and Parrott's land adjoining, mows both pieces of property and carts the hay from them over Williams' land to the highway, he is a trespasser when he carries hay from Parrott's land because the easement can rightfully be used only for the purposes of Nineacre field. However, if James stacks all the hay on Nineacre field and later, deciding to take it to market, carts it over the private way to the highway, he does not exceed his rights. The use in this case is bona fide in connection with Nineacre field and not with Parrott's land (17).

§ 53. **Same: Increased needs of dominant tenement. Improvements.** A way granted as appurtenant to a certain piece of farming land may or may not legally be usable for the purposes of the land after it becomes part of a thickly settled town. It must be determined from the terms of the instrument of creation, interpreted in the light of the circumstances under which it was made, whether only present needs or also remotely prospective increased needs of the dominant tenement were within

(17) Williams v. James, L. R. 2 C. P. 577.

the scope of the easement. Ordinarily a way acquired by prescription for general purposes will be good for all future needs of the dominant tenement.

The owner of the way may make any improvements, such as grading and paving, as are customarily deemed necessary for a way of the type to which he is entitled. The owner of a driveway from his pasture to his farm over an intervening field of another probably could not legally build a macadamized road against the objection of the servient owner. On the other hand, the owner of a roadway for general purposes to a country home might pave it if he so chose (18).

§ 54. **Passageways.** An easement of passageway through a part of a building is a very common type of easement. When a portion of a building is owned or held under a lease, generally there is such an easement for access, egress, and sometimes other purposes through another part of the building, created expressly or impliedly by the grant or lease.

§ 55. **Easements of lateral and subjacent support.** Rights of support from land and buildings of another, in addition to the natural right of lateral and subjacent support discussed in the preceding chapter (§§ 4-9), may be acquired as easements. If a building is owned by different persons, each owning one or more floors, as is the case with many of the large apartment buildings in New York city, the owner of one part has a right to insist that the support and protection from the weather afforded by other portions of the building be not withdrawn. He

(18) Newcomen v. Coulson, 5 Ch. Div. 133.

can not legally compel the owners of the other parts to make repairs necessary to maintain the structure, in the absence of some collateral special obligation or charge binding them or their interests in the building. Only active interference with the support is prohibited by the right.

If the land on which the building stands is owned and possessed by one person and the building by another, the possessor of the building legally can prevent any interference with the foundations or stability of the building through operations on the land by the land-possessor or others. These rights of support are easements, created expressly or impliedly by the conveyance or conveyances through which there came about diversified ownership in the one case of the buildings, and in the other, of the land and building. A right to insist that excavations in neighboring ground, which will cause damage to the buildings on the land of the owner of the right, shall not be made may be acquired as an easement.

§ 56. **Party walls.** Party walls are the objects of easements of support of a most important kind. In cities, frequently buildings on adjoining lots will have a common wall running along the division line. Sometimes this wall stands wholly on one of the two parcels of land, and sometimes partly on each parcel. Generally, easements will exist in such a wall and the land on which it stands, created by some grant or agreement between the owners of the respective lots or some of their predecessors in title. If, in such a case, the wall stands wholly on the land of B, generally he owns the wall and A has only an

easement appurtenant to his lot to have the use of the wall for his building. If the wall stands partly on the land of A, and partly on B's land, generally each owns the part on his land, and has an easement appurtenant in the other part.

§ 57. **Creation of party wall easements.** These rights do not necessarily exist if there is a common division wall between adjoining buildings, but must be based upon some expressed or implied grant or agreement in the respective chains of title to the two lots, or upon the compliance with some statute giving the right, or perhaps, in some jurisdictions, under some circumstances, upon prescriptive assertion of a claim to the right.

§ 58. **Statutes concerning party walls.** In some of our states there are statutes concerning party walls, some of which provide that the owner of land may place one wall of his building partly on adjoining land as a party wall, and that the neighbor shall have the right to use the wall when he builds. There have been decisions both for and against the constitutionality of these statutes by the courts of different states. Independently of such a statute, of course such an infringement of a neighbor's boundary line would be a trespass, and the neighbor would have the right to take as his own the part of the wall built on his ground.

§ 59. **Ownership in common of party wall.** Sometimes, though rarely in this country, a party wall and the land on which it stands, is owned and possessed in common by the owners of the two adjoining lots. In such a case,

these owners have not mere easements in the wall, but possessory rights of user.

§ 60. **Party wall easement rights.** An ordinary party wall easement entitles its owner to keep the wall in repair and to increase its height for the purpose of erecting a taller building, if he does this carefully and with due regard to the stability and purposes of the wall. The addition to the wall is subject to the same rights as is the part beneath. The owner of the easement can not compel the owner of the servient tenement to repair or to aid him in repairing or maintaining the wall even though it is in a ruinous condition. If the easement was intended to outlast the natural life of the wall, however, he may go so far as to rebuild it, taking reasonable care against injuring his neighbor's property in so doing. If the easement was created for the life of the one wall only, the easement is at an end when the wall is destroyed by fire or becomes otherwise totally unusable, and, in such a case, the owner of the easement would have no right, under the guise of repairing, practically to rebuild a new wall. He has no right to put windows in the wall (19). Indeed, it has been held that he violates the right of his neighbor if he does so, is liable to him for damages, and, in a proper case, may be compelled by injunction to close up the opening.

§ 61. **Division fences.** A right to have a division fence wholly or partly on a neighbor's land is a common appurtenant easement. Often there is an accessory obligation, enforceable against the successive possessors of

(19) Normille v. Gill, 159 Mass. 427.

the servient tenement, to maintain the fence at their own expense. This obligation is sometimes spoken of as an easement, but, being a right enforceable against particular persons only, namely, the successive possessors of the servient tenement, it cannot properly be classed as an easement, even though we use the word in its widest sense. It belongs among the rights discussed in Chapter III of this article.

This spurious easement may also be obtained by prescription (19a).

§ 62. **Statutes concerning division fences.** Statutes providing for the apportionment of the burden of maintaining division fences between adjoining owners exist in many of our states. Generally they do not require a land-owner to contribute to the expense of maintaining such a fence, if he chooses to let his land lie unenclosed and unoccupied or sometimes simply unenclosed. Most of the statutes prescribe a special process for determining the proportion of the fence which each owner is to maintain.

§ 63. **Light and air.** A right to have light come to certain windows or other openings in a building across the land of another is a common easement in England, and is of less frequent occurrence in this country. It is difficult, if not impossible, to obtain easements of light and of support for land and buildings by prescription in most jurisdictions of the United States. The difficulty

(19a) Bronson v. Coffin, 108 Mass. 184-5; Adams v. Van Alstyne, 75 N. Y. 232.

lies in finding a claim of right to use, evidenced by some interference with the rights of the possessor of the land to be burdened, which he can successfully oppose within the prescriptive period. Easements of this sort may, however, be obtained by grant, devise, or written contract, or through condemnation by a person having eminent domain rights.

§ 64. **Pews.** Permanent pew rights in churches are generally easements in gross. It is possible, however, to give a lease of the pew, involving delivery of possession to the pew-holder. If a mere revocable permission to occupy is contemplated by the parties, the pew-holder has no property right to the pew, properly speaking.

§ 65. **Burial rights.** Burial rights in a cemetery may exist, either by virtue of ownership and legal possession of a burial lot, or as easements in a lot owned by the corporation or society controlling the cemetery. The use of lots in the cemetery by the owners of the burial rights is subject to whatever reasonable rules the corporation or society controlling the cemetery enforces.

§ 66. **Public parks.** Public parks sometimes exist by virtue of an easement in the public for that use, though probably more frequently the state or some municipality owns the park in fee. If the park is created by common law dedication, only an easement passes to the public, ownership of the land remaining unchanged.

§ 67. **Miscellaneous easements.** Rights to drain across another's land, either through artificial ditches or through pipes, rights to carry water supply by any of various

means across another's land, and rights to construct, maintain, or use artificial water courses on another's land are common sorts of easements which are governed by general principles already noted.

Telegraph and telephone companies and electric power companies frequently acquire easements to maintain wires and poles across another's land for the purposes of their business.

A right to flow water upon another's land by means of a dam or otherwise is a common easement, especially in the New England states.

Other common types of easements are: a right to pile lumber or other material on another's land; a right to have a sign or part of a building overhang a neighbor's lot; a right to place advertisements on another's land.

§ 68. Implication of easements. If a person makes a conveyance of certain land, retaining other land adjoining or in the neighborhood, easements may arise by implication from the conveyance and the circumstances under which it was made, in favor of the retained land over the land conveyed or vice versa, without mention being made of them in the instrument of conveyance. The principles governing such implications are treated in the article on Title to Real Estate, § § 27-30, in Volume VI.

Section 3. Equitable Easements.

§ 69. Distinctions. It has already been pointed out (§ 32 and § 35) that an easement cannot be granted to a person so as to give him a complete legal title except through a deed, or, in some states, a written instrument with or without a seal; and, that in cases where there is

only a good written contract for an easement, which does not happen to satisfy the local law as an instrument of grant, there is created in lieu of a legal easement, what is called an equitable easement, differing little from a legal easement in the layman's view. There is another class of equitable easements which have characteristics as to validity and enforcement similar to those of the class just mentioned, with the exception that they cannot be converted into legal easements through a decree perfecting the legal title. It is this class of equitable easements that will next be discussed.

§ 70. **Equitable restrictions on use of land.** In selling land in the better residence districts of a city, and especially in opening a new subdivision for sale as residence property of high class, it is generally found advisable to put stipulations in the deeds of conveyance concerning the use of the different lots in some particulars. For instance, a very common provision is that there shall be no building within a certain distance of the street line. Another common restriction is that no trade shall be prosecuted on the premises. Frequently it is stipulated that the buildings erected on the lot shall be of a certain minimum value. Of course all these restrictions have the common purpose of creating and maintaining conditions which make land very desirable for residences. They do not give rise to legal easements, no matter how formal the instrument of creation may be, because they do not provide for rights to *use* another's land, but contemplate primarily only restriction of the use by others. However, such restrictions will be enforced in equity not only

against the promisor and his successors in interest, but against the world in general, excepting purchasers for value without actual or constructive notice. The consequent equitable rights belong in the same large group of non-possessory rights in land as legal easements.

§ 71. **Reasonable restrictions on use are enforceable as equitable easements.** It is not merely restrictions in aid of maintaining the residential character of land that will be enforced in this way. Generally any reasonable limitation of use, not against public policy, may be raised as an equitable easement through agreement with the possessor of the servient land. However, the courts of some jurisdictions are not as liberal in permitting them as others. In particular some courts have refused to enforce *as equitable easements* agreements excluding certain businesses from land, made not for the purpose of promoting the residential desirability of adjoining lots, but to prevent competition with the promisee and his assigns.

One Owen owned all the land in a little town called New Harmony, Ind. He sold a mercantile business to one Taylor and leased him buildings in which to carry it on, agreeing in the lease that Taylor should have the exclusive right for ten years to keep a store in the town. Afterwards Owen leased another house and lot to one Rogers, who underlet to Moffat. Moffat opened a store on this lot and Taylor sued to restrain him. It was held that, whether or not the agreement between Owen and Taylor was a valid contract, Taylor had no equitable rights in the lot leased to Moffat; and therefore could not

get a decree against him (20). The weight of authority, however, sustains the enforceability of similar restrictions as equitable easements, provided the agreement raising them is not void between the parties to it because in unreasonable restraint of trade or in some other respect against public policy (21).

§ 72. **Contracts to act affirmatively do not raise equitable easements.** It is to be carefully noted that these equitable easements do not include rights to compel a land-possessor *to perform some act.* They are merely *restrictive* of the servient owner's user. Rights burdening a possessor of land in that capacity with the duty of some action are not rights good against the world in general, and therefore fall, not in this chapter, but in Chapter III. For example, a covenant to keep a way in repair, made with the owner of the easement by the owner of the servient land for himself, "his heirs and assigns" would bind the promisor and subsequent possessors of the servient land claiming under him, but it would not lay a duty to repair on such other persons as, for instance, an adverse possessor of the servient land.

§ 73. **Restrictive agreements limited to bind particular persons only do not raise equitable easements.** Nor is a right to restrict the use of particular persons only, as for instance, the promisor and his successors in interest, an equitable easement. Nevertheless, the terms of an agreement which include expressly only certain specified persons, may be construed and enforced as intended to

(20) Taylor v. Owen, 2 Blackf. (Ind.) 301.

(21) Hodge v. Sloan, 107 N. Y. 244.

raise a restriction against the world in general. Thus, a stipulation in a lease that the lessee, "his representatives and assigns" shall not sell intoxicating liquors on the premises, ordinarily would be enforced as an equitable restriction against an underlessee or any other occupier who took with actual or constructive notice or did not give value for possession of the land, because evidently such a restriction is intended absolutely to prevent the prohibited use.

§ 74. **Duration of equitable easements.** A restriction may be limited to a certain duration or to the accomplishment of certain purposes, or may be imposed indefinitely. Of course, however, if the promisor has less than a fee in the servient land, he cannot, without special authority, extend the burden beyond the duration of his estate. Whenever the purposes for which a restriction was imposed upon a lot or tract cannot be accomplished and the enforcement of it will work a great deal of hardship without any considerable benefit resulting to the plaintiff, the courts will no longer exact specific compliance with its terms, but will give damages to the plaintiff for the loss he suffers in lieu of a decree for specific enforcement (22). For instance, if restrictions are imposed with the end of maintaining the residential character of a district, and later the neighborhood becomes permanently devoted to business, with the result that little good can be accomplished by enforcing the restrictions specifically, the courts will not do so, but will allow only money damages for whatever detriment may be shown.

(22) Jackson v. Stevenson, 156 Mass. 496.

§ 75. **Equitable easements may be appurtenant or in gross.** The benefit of an equitable easement may be secured to a person independently of his possession of any particular land, or it may be intended as an enhancement of the possessory enjoyment of one or more certain lots. In the first case, the right is an equitable easement in gross. In the second case it is an equitable easement or easements appurtenant, and follows the possession of the lots to which it is attached as the benefit of a legal easement appurtenant follows the possession of its dominant tenement. In order, however, that an equitable right of this sort may be appurtenant to a certain lot, it must have a tendency to promote or aid in some way the possessory use of that lot, and there is a conflict of authority as to whether a benefit to a certain business which is carried on upon the lot, by excluding competition on the adjoining lot, is sufficient (23).

§ 76. **Creation of equitable easements.** No special formality is required to create an equitable easement. The requisites of a valid contract must exist and it is best to put the agreement in writing to escape any difficulty with the statutes of frauds, although some courts hold these agreements not within this statute (24).

Section 4. Licenses.

§ 77. **Nature of licenses.** With respect to all easements it must be remembered that the acts done are

(23) Held not sufficient in Norcross v. James, 140 Mass. 188. Contra: McMahon v. Williams, 79 Ala. 288.

(24) Trustees v. Lynch, 70 N. Y. 440, 447; Hall v. Solomon, 61 Conn. 476.

justified by a right enforceable against the world in general. If the act is merely permitted by the possessor of the servient land, the doer has not an easement, but only a license—not a right, but a liberty. Licenses are only permissions and are always revocable by the licensor. Also, they are personal to the licensee, but sometimes they may include the servants and agents or family or friends of a person as subordinate or co-licensees. If the licensor ceases to have such rights in a piece of land as enable him to control its use, his permissions to use are clearly ineffective and cannot be relied on as a defense to a charge of trespassing. The licensor himself, however, cannot revoke a license, and then before notifying the licensee, hold him liable as a trespasser for acts done in reliance on the license after its secret revocation.

Jones gives oral permission to Smith to cross Jones's lot to reach Smith's house. This is a license to Smith. It does not give Smith a right to cross the lot against Jones's wish. The license merely makes the use legal. Jones may at any time revoke this permission; but he cannot hold Smith liable as a trespasser for using the way, before he received notice of the revocation. Smith cannot transfer his license to anyone else; but if the permission was a general one to afford a sole means of access to Smith's house for all purposes, it may be construed as a license not only to Smith, but to members of his family, his servants, agents and friends, and to tradespeople and all others who come to see him. Jones may revoke the permission at any time as to any or all of these. If he transfers his lot to another, or dies, whoever suc-

ceeds to possession may without notice hold as a trespasser anyone who continues the use; for the permission of Jones is not effective against any possessor except Jones.

§ 78. **Examples of licenses.** Licenses to use land are very common—much more common than are easements. Every store keeper gives an implied license to the public to enter and trade with him. This permission a store keeper may revoke at any time and he may bar at any time any particular member of the public for no reason at all. Every householder gives implied permission to anyone who wishes to see him to enter his premises for the purpose. Theater tickets are merely licenses, which may be revoked by the management at any time, although if this is done without good cause, it will be a breach of contract unless a privilege to revoke without liability is expressly retained. Under any circumstances, a revocation without cause will entitle the ticket holder to a return of the unearned consideration. The licensee of the ordinary theatre ticket is not the original purchaser necessarily, but whoever holds it when the doors open for the performance. Railroads and hotel keepers give implied licenses to the public to enter their buildings, offices, and cars for the purpose of engaging or using their facilities. The acceptance of a guest or passenger gives a license to use the accommodations engaged.

A lodger has a mere license to occupy his room and not a lease on it. If the proprietor of the house, even without cause, revokes his license, the lodger cannot insist on staying. If he refuses to go, the proprietor may put him

off the premises, using no unnecessary force and causing no unnecessary insult and no serious injury to him, without becoming responsible for assault. However, the lodger will have an action for breach of contract, if he has an agreement for lodging extending beyond the time of expulsion and no good cause for the termination of the license is shown.

§ 79. Defective agreement for something more than a license. Sometimes an agreement is made for the creation of an easement or some other property right which does not effectually create the right because of some deficiency in form. For instance, an easement of way is stipulated for orally, or, in a jurisdiction where a grant of real property must be under seal, in an unsealed written instrument. The result at law will be a mere license. The consent to use is present; the grant of a legal right to use is defective. However, in many cases, if the instrument is a written contract there may be raised an equitable interest corresponding to the legal interest intended—for instance, an equitable right of way instead of an easement. This equitable easement will be due to the equitable principles of specific performance which are enforced under circumstances and conditions considered in the article on Equity Jurisdiction in Volume VI of this work.

For the creation of an irrevocable right by estoppel against the licensor, see § 25, above. For the specific enforcement of oral contracts for easements, when acted upon by the licensee, see the article on Equity Jurisdiction in Volume VI of this work. In no case, however,

will what was clearly intended as a mere revocable permission by the parties be erected into an easement or other irrevocable right by the court. A license given by deed is still a license and nothing more, and no expense by the licensee will make it more.

§ 80. **"Irrevocable licenses."** Agreements for use which are enforced as creating equitable easements are sometimes called "irrevocable licenses," but this is a misnomer. Licenses are always revocable, being merely permissions (§ 77, above). If a right outlasts the duration of a licensor's consent, it is not an "irrevocable license" but a right independent of the continuance of the license.

There is another class of so-called "irrevocable licenses" concerning which a word should be said. It is frequently stated that "a license coupled with an interest is irrevocable." Certainly this does not mean all it literally says, for no license is irrevocable, properly speaking; and an irrevocable right is not always created when a person has a license and is interested collaterally in its continuance. The only type of case falling within this vague expression in which we have a present interest is this: X buys hay of Y and with Y's consent leaves it on Y's land. He afterwards returns to get it and Y refuses him entrance and also refuses to deliver the hay. X has a right to enter and cart away the hay provided he can do so without a serious personal encounter with Y (25). He would not be justified in doing Y great bodily harm, though the harm were a necessary result of forcing an

(25) Wood v. Manley, 11 A. & E. 34.

entry (26). X's right of using Y's land for the purpose of removing the hay is not an "irrevocable license." The implied license to enter, given when the sale was made, has been revoked, but X has nevertheless a limited right of self-help given him by law under the particular circumstances of the case, which entitles him to act as though the license were still in existence. If Y should deliver the hay at his boundary line, X's right of entering would be gone.

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(26) Churchill v. Hulbert, 110 Mass. 42.

CHAPTER III.

RIGHTS IN PERSONAM CONCERNING THE USE OF LAND.

§ 81. **Distinctions.** The ordinary rights of a land-possessor, discussed in Chapter I, and profits and easements, discussed in Chapter II, are rights enforceable against the world in general, or what are known technically as rights in rem. The contract rights which we are to consider in this chapter are good against only particular persons, namely the promisor and the successive possessors of a parcel of land, holding under title from him. Rights, good against particular persons only, are known technically as rights in personam.

§ 82. **Obligation of contracts generally unassignable.** Generally, if X makes a contract with Y, no person but X is bound, during X's lifetime, to perform the obligation which he thereby assumes. We need not consider here what becomes of it upon X's death. If X engages Z to satisfy the contract demand in his place, Z voluntarily assumes to perform a new duty and incidentally to satisfy X's, and is not bound merely by force of the original agreement.

§ 83. **Covenants in leases binding assigns.** Now let us suppose that X leases property to Y and covenants in the lease that he will keep the buildings in repair during the term of the lease. If X then transfers his landlord's interest to Z, Z will be bound on the covenant to repair whether or not he had notice of it when he took the trans-

fer. He is bound merely because he has succeeded to the position of X as landlord. He must take that position with all its duties. He cannot escape them even by making an agreement with X that X shall see to their performance. Likewise a landlord may hold the assignee of the original lessee, on the lessee's covenants as tenant; but he cannot hold a sub-tenant, because he is not a sub-tenant's landlord (1).

§ 84. **Same (continued).** There are several additional points to be particularly noticed with respect to these obligations between landlord and tenant.

1. In order that it may "run with the land" or "with the reversion," as the technical expressions go, an agreement must be a *covenant*—that is, an agreement under seal. Simple contract obligations do not "run." Probably in some states this rule has been changed by statutes; but it is never advisable to omit having each party to a lease or conveyance affix his seal as well as his signature.

2. The original parties to the covenant always remain bound. After they have ceased to be possessed of the burdened interest in the land, however, they are responsible only as quasi sureties (2).

3. Each successor to the position of landlord or of tenant is bound to performance of the obligations attached to his interest and is entitled to the benefits accruing during the time of his holding and no longer (3).

4. The only covenants which will run either as to benefit or burden are those relating to the rights and duties

(1) Holford v. Hatch, 1 Doug. 183.

(2) Mason v. Smith, 131 Mass. 510.

(3) Mason v. Smith, 131 Mass. 510.

of landlord *as landlord,* and of tenant *as tenant* of the particular piece of land leased. If, for instance, the lessee covenants in the lease to pay the landlord's debt to a third person, or to repair a building other than those leased; or if the lessor covenants to sell the lessee groceries at current market prices, the covenant is collateral to the relationship of landlord and tenant and will not run (4). In some doubtful cases, the naming of "assigns" and "personal representatives" as persons to be bound, will have the effect of making the covenants apparently of the proper sort and purpose to run; and generally it is advisable to covenant for "executors, administrators and assigns" in any case where it is intended that the covenant shall "run." See the article on Landlord and Tenant, Chapter III, elsewhere in this volume.

§ 85. **Covenants between owner of incorporeal right and possessor of servient land.** Let us consider another class of cases. X creates an easement over his land in favor of Y and the two enter into covenants with respect to the maintenance of the easement or defining their respective rights and duties concerning it. Such covenants, pertaining to the relationship of the holder of an easement and the possessor of the servient land, bear an analogy to covenants between landlord and tenant in that they concern reciprocal interests in the same piece of land. In most American jurisdictions they are held to run both as to benefit and burden, under restrictions and rules similar to those set forth with respect to landlord and tenant cov-

(4) Thomas v. Hayward, L. R. 4 Ex. 311.

enants in the preceding section (5). Covenants between the owner of any other incorporeal right in land and the possessor of the servient land fall into the same class.

§ 86. Burden of contracts generally does not run at law. Aside from covenants which fall into one of the classes discussed in the two preceding subsections, there are no contracts the burden of which will run *at law* so as to render successive possessors of the burdened interest personally liable in an action *at law* for damages for failure to perform during their respective tenures (6).

§ 87. Running of the burden of obligations in equity.

1. A covenant good against a certain person at law may be specifically enforced against him in equity under circumstances determinable by application of the principles governing the remedy of specific performance. See the article on Equity Jurisdiction in Volume VI of this work.

2. In some cases, an agreement which would have run at law but for the lack of a seal and which does not merely restrict the use of the promisor's lot may be enforced against it as an equitable charge, and, perhaps, against a subsequent possessor personally, in order to prevent him from obtaining a benefit inequitably. The decisions on this point are not numerous and therefore the law cannot be said to be entirely clear. However, we have at least one good authority. In the case of Whittenton Manufacturing Co. v. Staples (7) the supreme court of

(5) Morse v. Aldrich, 19 Pick. (Mass.) 449; Fitch v. Johnson, 104 Ill. 111.

(6) Hurd v. Curtis, 19 Pick. (Mass.) 459.

(7) 164 Mass. 319.

Massachusetts had to decide a question raised by these facts: The Taunton Manufacturing Co. owned a tract of land along a stream, which contained several mill-sites. The company built a large reservoir upstream for the benefit of these mill-sites. It conveyed one of them to the predecessor in title of the defendant and stipulated in the deed that a right to some benefit from the water-power created by the dam and reservoir above should pass as appurtenant to the land conveyed, and that the grantee, "his heirs and assigns, grantees of these premises," should be responsible for one-fifth of the damages which might be paid the proprietors of neighboring lands for flowing them by damming the stream on the retained land of the grantor. The grantee did not sign or seal the deed —that is, it was a deed poll. Therefore, according to the law of Massachusetts, the stipulation to pay a portion of the flowage damages was not a *covenant* of the grantee. The question was whether defendant, who had purchased the granted mill-site with notice of the stipulation, could in any way be charged with the payment.

The court held that by the deed an appurtenant easement in the water-power raised by the dams on the land retained by the Taunton Manufacturing Company was granted to defendant's predecessor. This land was owned by the plaintiff at the time the claim sued on accrued. Therefore plaintiff and defendant occupied the relationship of servient and dominant possessors. The stipulation concerning flowage charges clearly related to the burden of maintaining the conditions on the servient land necessary to full enjoyment of the easement. Therefore,

as the court stated, it was an agreement which would have run at law according to the weight of American authority, *had it been a covenant;* and although it was not a covenant, the court decided that it would be inequitable not to charge against defendant or his dominant land, the stipulated portion of the expense of keeping up the water-power in which the defendant had an appurtenant property interest. The court charged it against the land.

§ 88. Same (continued). 3. We considered the effect of *restrictive* agreements which raise equitable easements in the preceding chapter. It is to be noted in this connection that *restrictive* agreements which are intended to run with the land *at law,* may raise equitable easements whether or not they have the requisites of covenants which run. For instance, a covenant by a lessee for himself, his representatives and assigns, that no intoxicating liquors shall be sold on the premises leased, cannot be enforced as a covenant at law against a sub-tenant (§ 83, above); but in equity, the sub-tenant may be enjoined from breaking the restriction because it may be enforced as an equitable easement against him.

It is frequently said that an agreement raising an equitable easement runs in equity, and that persons who take the servient land with notice or as volunteers are bound to perform the promisor's contract. This is not true, though superficially it seems a short expression of the legal result. The *contract* does not run in equity. It raises in favor of the promisee and his successors in possession of the dominant land, *a right in the servient land* to restrict the use thereof; and it is infringement of this

right, not breach of a contract, that gives rise to his cause of legal complaint against others than the promisor. This will be perceived more clearly if we recollect that these equitable easements are enforceable not merely against successors to the interest of the promisor, but also against persons totally disconnected with his title, such as mere occupants, trespassers, or adverse possessors (8). In fact the contract operates in equity as a grant of an incorporeal right in the servient land.

4. If X contracts in writing to convey land to Y and then conveys it to Z, who takes with notice of the contract or takes without giving value, Y can compel Z to convey the land to him upon tendering performance of his part of the contract with X. Z is not bound to perform X's contract in this case; but he is bound to respect the equitable right to the land which is raised by the contract in favor of Y and he infringes this right if he keeps the land from Y. This is discussed at length in the articles on Trusts and Equity in Volume VI of this work.

5. Certainly it may be stated that there is no general principle or rule independent of statute that agreements *to do an affirmative act,* made by the owner of a piece of land and intended to bind the successive possessors of the land, will bind either them or the land in their hands (9). The cases in which either the land or its subsequent possessors will be bound are limited to the classes discussed in the preceding pages and perhaps some analogues.

§ 89. **Running of benefits of contracts.** We have al-

(8) 17 Harvard Law Review, 177.

(9) Hayward v. Brunswick Bldg. Society, 8 Q. B. D. 403.

ready considered the running of the benefits of covenants between lessor and lessee of land, and dominant and servient owners. The benefit of a contract generally is assignable as a property interest. However, unless the contract is negotiable, as is a promissory note for a certain sum of money payable to order or bearer, the assignee of the benefit can sue and recover only in the name of the original promisee, except where a statute has changed the common law in this respect. In many of our states there have been statutes passed which enable the assignee to sue in his own name.

If it is clearly indicated that the benefit of a promise is intended by the parties thereto to inure at all times to the possessor for the time being of a certain lot of land, there seems to be no objection in most of our states to permitting the benefit to run with the possession of that land without express separate assignment (10). If a possessor subsequent to the promisee sues *for breach of such a contract* (that is, does not sue for violation of an equitable easement or some other right *in the land*), he sues as assignee or beneficiary of it. Whether he sues in his own name or in that of the promisee will depend upon the local procedural law.

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(10) Shaber v. St. Paul Water Power Co., 30 Minn. 179; National Bank v. Segur, 39 N. J. L. 173. Cf. Lyon v. Parker, 45 Me. 474.

LANDLORD AND TENANT.

BY

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CHAPTER I.

CREATION AND NATURE OF THE RELATION.

§ 1. **In general.** The relation of landlord and tenant is usually created by contract express or implied, by which one party, called the lessor, having some interest in the land leased, grants to the other party to the contract, called the lessee or tenant, the right to possess and use the leased land in fee and forever; or during the life of the tenant or some other; or for a fixed and

specified period of time; or at the will of the parties. The relation arises when the tenant takes possession, not before.

§ 2. **Leases in fee, for life, and for years.** A lease in fee reserving rent to the lessor and his heirs and assigns is called *fee-farm*. Such leases are rare; and there is considerable room for debate, in the absence of statute, as to whether the assigns or even the heirs of the grantor can succeed to his rights under the lease against the grantee's grantee or heirs, or even against the grantee himself; but under the New York statutes it has been held that the grantor's devisee can enforce payment against the grantee's grantee, either by an action on the contract, by seizing a distress according to the terms of the original grant, or even by entering to defeat the grant by force of a condition inserted in the original grant that if the rent should not be paid as agreed the grantor or his heirs or assigns might make entry and defeat the grant and have the land absolutely (1).

A lease to one for the term of his life or the life of another or others is called a lease for life. A lease for any certain and specified time (years, weeks, months, or days) is called a lease for years; and when the lessee has made entry under the lease he is said to be possessed of his term. It has been held that until entry he has no such interest in the land that he can maintain an action at law against the lessor to recover it, though he may

(1) Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Ball, 19 N. Y. 100.

sue in equity for specific performance of an agreement to lease.

§ 3. **Leases at will, at sufferance, and from year to year.** When the letting is for no definite time, but at the will of both, or at the will of either (which the law makes mutual by giving the right to both), it is called a tenancy at will. When a tenant holds over after his legal right to remain in possession has terminated, he is somewhat inaccurately termed a tenant at sufferance; for if he was a tenant for years he thereby gives the landlord the right to elect to treat him as tenant for another term at the same rent, and in any event the landlord need only make a formal entry on the premises to acquire the right to sue the tenant holding over as a trespasser, and unless the landlord has by word or act given sanction to the holding over he need give no notice to quit, but may eject him summarily under the statutes and practice prevailing in the particular state. A lease for an indefinite period, with a reservation of periodical rent, payable yearly, monthly, or quarterly, is often called tenancy from year to year. Such holdings were originally merely at will; but they acquired this new name when the courts in England came to hold nearly two hundred years ago, that they could be terminated only by notice to quit at a rent day not less than six months after the giving of the notice. See the article on Title to Real Estate, §24, in Volume V of this work. While a stipulation for the payment of rent is a common incident to the relation of landlord and tenant, this tenancy from year to year is the only kind of tenancy

to the existence of which the obligation to pay rent is essential.

§ 4. **Leases by implication.** While the relation of landlord and tenant is ordinarily the result of contract, it may be raised by implication. A tenant for life with a limited power of leasing made a lease exceeding his power, and died during the term, after which the remainder-man accepted rent according to the contract with the life tenant and later sued the termor as a trespasser. The court held the suit not maintainable. The court said: "If the defendant were not a tenant he must have been a trespasser, and so he must have continued if he had remained on the premises for any number of years; but the plaintiff has, by his own act, admitted the defendant to be his tenant, and cannot, therefore, now consider him a trespasser. It has been said, however, that the plaintiff was ignorant of his title when he received this rent; but he was bound to know his own title, and he cannot avail himself of his ignorance to the prejudice of the defendant, and say that, because he did not examine his own title, he may consider the defendant as a trespasser and turn him out of possession without notice" (2). If there be a lease for a year, and by the consent of both parties the tenant continue in possession after the term is ended, that implies a tacit renewal of the contract to hold for another year at the same rent and subject to the same terms. But this relation of landlord and tenant is never implied when the acts and conduct of the parties are in-

(2) Doe d. Martin v. Watts, 7 Term, 83.

consistent with it, as a wrongful entry and adverse possession, entry under void contract to buy, &c. For the reason that the nature of the relation of landlord and tenant is generally well known to the intelligent citizen, this general statement of the nature of the relation can best be continued by pointing out what does not create that relation.

§ 5. **License and lease distinguished.** There is often serious doubt as to whether the agreement of the parties contemplated a permission to the one to use the property of the other without acquiring any interest in it (which would be a license) or gave the other such a possessory interest as to create the relation of landlord and tenant. In one case the fire commission ordered the removal of seats in a theatre after tickets for the performance had been sold; the purchaser demanded the seats he had been promised, and made such a disturbance on denial of them that he was told to leave or take other seats offered; he left and brought suit as for a trespass; and it was held that he could not recover. He might have recovered in an action for the money he had paid, but he could not recover on the theory that he was a tenant of the seats; he was merely a licensee (3). In another case it was held that an agreement by the owner of land that another should have the right to cut as much wood as he pleased on the land, paying 25c. per cord for the same, did not create the relation of landlord and tenant, but of licensor and licensee; and that the licensee could not recover in an action of trespass when he was compelled

(3) Horney v. Nixon, 213 Pa. St. 20.

to stop (4). A few of the important results flowing from the fact that it is a license and not a lease are that the license is not assignable, is valid though created without any writing or legal form, and may usually be revoked at will.

§ 6. **Assignment and lease distinguished.** If the tenant grants to another the right to occupy the whole or a part of the premises demised for a part of the term, even for all but the last day of the term, this is a sublease; and the new tenant becomes tenant of the first tenant, not tenant of the original lessor. But whenever the whole term is made over by the lessee, although the deed by which this is done contains new covenants between the parties to it and reserves additional rent and a right of re-entry and distress for non-payment of it, yet the instrument amounts to an assignment; the result of which is that the original lessor may sue the assignee and is liable to be sued by him on the covenants contained in the original lease which run with the land and the reversion as hereinafter explained (see §§ 34-35, below).

§ 7. **Lodger and tenant distinguished.** An entire floor, a series of rooms, or a single room, may, no doubt, be let for lodgings and so separated from the rest of the house and given over to the possession of the lodger as to create the relation of landlord and tenant between him and the proprietor of the house. But when one contracts with the keeper of a hotel or boarding-house for rooms and board, or for rooms alone, whether for a

(4) Kitchen v. Pridgen, 3 Jones Law (N. Car.) 49.

week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the end of the time agreed on, he cannot maintain ejectment nor in any way recover the possession of the rooms; the contract does not have to be in writing to be valid, though there be a statute requiring leases for such a term to be written; and the right of the keeper of the house to seize his goods to compel payment of his bill, must be found either in his right at common law to a lien as a public inn-keeper against a guest, or in the statutes extending that right to boarding-house keepers—it cannot be sustained on the common law or statutory right of a landlord to distrain for non-payment of rent.

In one case a boarding-house keeper sued on a contract to provide rooms and board for defendant and his family for $75 per week, who alleged that the agreement was void, because it assumed to pass an interest in land and was not in writing as the statute required. The defendant had left and was not receiving the accommodations. The court pointed out that the relation of lodger to the keeper of the house is one of service to the lodger rather than the use of property, and that he does not have that exclusive possession that a tenant exercises and is entitled to. The court said in part: "The defendant took, by reason of the fact that the rooms in which he and his family were to lodge were specified in the agreement, no greater legal right in those rooms than he would, if they had not been so specified, have taken in the house. There

was no evidence to warrant the inference of an agreement that the defendant should have any such exclusive possession of the rooms specified as would enable him to maintain an action founded on that possession either against the plaintiff or against a stranger. The only rights of action between the parties are upon the agreement itself." And so the plaintiff recovered (5).

§ 8. **Flats, office rooms, apartments, and desk-room.** On the other hand, one may by contract and occupancy become tenant of an apartment, flat, or even desk-room in an office, provided there is that exclusive possession and right of possession essential to an interest in the realty. It is not necessary that there be an exclusive outside entrance; the tenants of flats and suites in apartment houses and office buildings seldom have that, and yet, if they have the exclusive possession, the relation of landlord and tenant exists. This relation may exist though the contract requires the lessor to furnish light, heat, water, or even a janitor to sweep out. One who rents a furnished cottage with right of exclusive possession and makes entry becomes a tenant.

§ 9. **Agent, servant, or tenant.** The occupation by a servant incident to his employment does not create the relation of landlord and tenant; but the distinction is sometimes very close. The occupancy of the schoolhouse by the teacher and the duty to keep it in order does not make him the tenant of the school-district. The possession of the parsonage by the minister of the church as incident to his service has been held not to

(5) White v. Maynard, 111 Mass. 250.

make him tenant of the church society, and therefore they were not liable in trespass for ousting him summarily without notice upon discharging him from the service; and the contrary has been held in other similar cases (6). A man hired to work and have charge of a farm, and by his contract required to occupy the farm house and provide meals and beds for the workmen on the farm and care for the animals, milk, etc., on the farm, was held not to be a tenant nor entitled to any notice to quit on being discharged, though the housing of his family was part of the consideration for his services. The work ended, the right ended (7).

§ 10. **Same: Illustration.** On the other hand, a quarry company was held liable in trespass for removing from their boarding-house without notice the goods of the keeper, who occupied under a contract to devote his entire time to the management of the house, pay $65 per month as rent, and receive for his services only $4.50 per week each for boarding such men as the company should send to him. The court said:

"If the plaintiff was merely the servant of the company, employed to manage the boarding-house for them, there could be very little doubt but that his use or occupancy of the buildings was also as servant, and not as tenant, being merely accessory to the more convenient performances of his duties as servant. If the use or occupancy be as servant, the law is well settled that the master does not part with the possession, the servant's

(6) Bristor v. Burr, 120 N. Y. 427.

(7) Bowman v. Bradley, 151 Pa. St. 351.

possession being the master's. If the servant is discharged, he must, on request, quit the premises; and, if he refuses to go, the master may eject him, and for that purpose use such force as is reasonably necessary. The master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as the other; the master incurring the risk of paying damages for breach of the contract of employment, which would be the servant's only remedy. But the question here is, was plaintiff the servant of the company at all, or was he their tenant? A tenant may be defined to be one who has possession of the premises of another in subordination to that other's title, and with his consent. No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of the possession, and confer it upon another, but of course in subordination to his own title, are sufficient. While, of course, the existence of certain things is necessary to constitute a lease, there is no artificial rule by which the contract is to be construed. It is largely a question of the intention of the parties, to be collected from the whole agreement.

"It seems to us that the agreement in the present case all looks to a leasing of these boarding-houses to plaintiff, and not to an employment of him as agent to manage them for the company. Every provision of the contract contemplates his occupancy as landlord or proprietor. There is nothing to indicate that his possession of the buildings was not to be exclusive; on the contrary, the

nature of the business and the manner in which it was run necessarily imply that it was to be exclusive. He was to run the business, not for the benefit of the company, but for himself; the profits, if any, being his, and the losses, if any, he would have to stand. He took his chances on the number of boarders he would get; the company did not obligate themselves to furnish any particular number. He furnished the houses and provided the supplies at his own expense, just as any boarding-house keeper would do, if running the business as principal, and not as agent for another. What was paid him was for boarding the men, and not as compensation for services as agent. Moreover, he had to pay a fixed rent for the use of the buildings, the amount of which was not at all dependent upon the number of boarders the company furnished. It was to be the same whether they furnished one or one hundred. The manner in which the board-bills of the men or the rent for the buildings were to be paid is unimportant. That was a mere question of convenience. The fact that plaintiff was obligated to board the company's men, and that he was to give his time to the supervision of the boarding-houses, is not at all inconsistent with the idea of a lease. In short, the whole contract, in our judgment, shows an intention, not to employ plaintiff's services as agent, but to lease the buildings to him, with just such covenants and conditions as to the manner of their use and the mode of conducting the business as would naturally be incorporated

into a lease, in view of the relation the buildings bore to the company's business'' (8).

§ 11. **Working on shares.** What is known as farming on shares, which may be working in any business for a share of the profit but is more common in cropping land than in other occupations, may be any one of three very different arrangements; and which it is depends on the terms of the contract. First, it may be a hiring of the cropper by the landowner, it being agreed that a share of the crops raised shall be the consideration for the services rendered. Secondly, it may be a sort of partnership in which one of the partners furnishes the land, the other furnishes the labor, one or both furnish the seed and tools, and they share in the profits. Or, thirdly, it may be a lease, in which the landowner agrees to receive part of the crops as rent. The relation of landlord and tenant exists between them only in the case last named.

If it is a contract of hiring to be paid in a share of the crops, the landowner owns the whole crop, and the workman has no interest in it which he can sell, mortgage, or which will excuse any intermeddling with it by him, until his share has been delivered to him in payment, and the landowner has the right to make the division. On the other hand, if it is a contract of leasing, and a part of the crop is to be paid as rent, the tenant owns the whole crop, has the exclusive right to management and division, and the land owner has at most only a lien on the crops for his rent until his part has been paid to him by the tenant. Such a leasing differs from a letting for

(8) Lightbody v. Truelson, 39 Minn. 310.

money rent only in the fact of the personal element that the produce of the land largely depends on who is doing the farming, and this takes from the tenant the right to assign the lease without the consent of the landlord, which is not necessary to an assignment of the right of the tenant under a lease reserving rent payable in money. For the same reason the tenant could not sublet; and upon such subletting it has been held that the landlord may demand and recover of the tenant a money rent, or take possession as for a forfeiture if there was in the lease a condition of forfeiture on breach of any of the terms of the lease.

The relation of landlord and tenant is not created by a mere contract to farm on shares with joint possession and management by the owner and cropper. To the existence of that relation it is essential that the contract shall contemplate an exclusive use and possession by the tenant. Such contracts may also assume the nature of a mortgage, as where it is agreed that the landowner or any other shall furnish the seed or supplies necessary to produce the crop and shall have a lien on the crop for his advances, or a lien for his advances and a share of the crop for the use of the land. The courts will construe the contract to be a lease if the share of the crops is to be paid to the land owner *as rent* and whenever it appears from the terms of the instrument as a whole that a lease was intended (9).

§ 12. **Lease or contract to sell.** Taking possession under a contract to sell and convey does not create the re-

(9) Meyer v. Livesley, 45 Ore. 487.

lation of landlord and tenant between the buyer and seller. But there is nothing to prevent a lease and a contract to sell being embodied in the same writing; and where both are not intended, it is sometimes difficult to determine from the instrument which the parties intended. That the parties have used the word "lease" or "rent" or similar expressions in the paper is significant but not controlling; the intent is gathered by the court from the instrument as a whole, and the court will not consider what the parties may afterwards desire to testify as to what they understood or intended by it—the instrument is the best evidence as to that. The parties may also insert in a lease a provision that it shall operate as an absolute sale upon some subsequent event.

Under a written contract, whereby the owner of land rented the same to another for a term of years at a stipulated rent, to be paid annually in cotton or its equivalent in money, the tenant to pay all taxes and make certain improvements during the term, although the contract also contained a provision that the tenant should at the end of the term have an option to purchase the land at a named price and on specified terms, the relation of landlord and tenant was held to exist between the parties during the continuance of the term; and therefore the court refused to restrain the lessor from suing out a warrant under the statute to eject the tenant summarily during the term for non-payment of the stipulated rent (10). In another case (11) the court ordered spe-

(10) Clifford v. Gressinger, 96 Ga. 789.

(11) Davis v. Robert, 89 Ala. 402.

cific performance of the contract, where the lease was: "I, D, have this day rented to R (the land describing it) for the term of 10 years . . . and if he pays to me the above-named rent at the times agreed on, then I hereby agree to make to said R a good and sufficient deed to said land as a free gift." The court held the payment of the rent sufficient consideration for the promise to convey.

A contract of purchase is often converted into a lease by a clause inserted in the contract that upon default in making payment the vendee shall be deemed the tenant of the vendor and liable for a stipulated rent for the term of his occupancy; or the parties may at the time of the default agree for a continued possession and payment of rent. But in the absence of such an agreement the buyer does not become the tenant of the seller by making default in his payments, nor liable to pay rent as for use and occupation. On the other hand, it has been held that a contract to sell and deliver possession at a future day, or a present sale reserving possession till a day named does not make the seller tenant of the buyer; and yet failure of the seller to deliver possession on the day named has been held to entitle the buyer to recover possession by summary process as against a tenant holding over after his term is expired.

CHAPTER II.

THE LEASE.

Section 1. Form and Interpretation.

§ 13. Necessity of writing. Statute of frauds. At the common law no writing was necessary to any lease, even for a thousand years; but by the statute of frauds, 29 Car. II (1677), c. 3, §1, it was declared that to prevent frauds commonly endeavored to be practiced by perjury, all leases for more than three years should from henceforth have the force and effect of leases at will only, unless they were reduced to writing and signed by the parties making them or by their agents thereunto lawfully authorized by writing. That statute has not the force of common law in this country, because it was enacted since the settlement of the colonies; but statutes in substantially the same terms will be found in all the states, patterned after this statute, and varying from it only in that many of them require all leases for more than one year to be in writing, and some of them say within a year "from the making thereof". In the absence of this phrase, most of the courts have held that an oral lease for the full term allowed is void unless it is to begin at once. In a few of the states requiring leases for more than a year to be in writing, oral leases for a year to begin at a future day are held to be valid. By the original statute and the statutes of several of

the states no oral lease is valid unless the rent reserved thereon is at least two-thirds as much as the use of the land for the term is worth. By some statutes all oral leases have merely the effect of estates at will. The power to another to make the lease must be at least as formal as the lease to be executed, that is under seal if the lease must be under seal, and may be for general purposes including the particular lease by its general terms, or it may be for the particular occasion. A lease executed by another in the presence of the lessor and signed for him at his request is deemed to be executed by the lessor in person, and no written power is necessary; but in such cases the lessor usually adds his cross to authenticate the signature.

§ 14. **What is a sufficient writing?** These statutes do not require that the writing shall be executed under seal, and a perfectly valid lease may be made without observing the proper legal forms. A letter offering to give or take the lease, and specifying the terms, and a reply accepting the offer unconditionally constitute a sufficient lease under any of the statutes. But if the reply imposes new terms no lease is made out till these are unconditionally accepted by the other party. No lease is made out unless the writing or writings make reasonably certain what premises are intended, by describing them or making some reference by which the description may be ascertained; nor unless the time of commencement and duration of the term and the amount of the rent to be paid are stated. A signed and dated receipt on a bill of sale of hay and oats, with the memorandum "Left at

stable on O street where P takes possession. Rent to begin October 1, 1870, for one year at $150,'' was held a sufficient memorandum under the statute, parol evidence being resorted to to aid the description (1). Again, a receipt for $10 ''from C on rent of store on corner of Z (No. 22) and C streets, which C is to have for a $100 a month until May, 1873,'' was held sufficient (2). While the statute requires that the lease be signed by the party making the same, any mark designed by him for a signature will suffice; it need not be his name. The signature need not be at the end, though that is the only proper place. The writing may be printed, and if written by hand may be in ink or with pencil.

§ 15. **Certainty of term required.** As to the certainty of the term, it might be a valid lease at will without any certainty as to duration; but without certainty as to the time of commencement it would seem to have no validity unless as a license which would operate as a defense to an action of trespass for taking possession before being forbidden to do so. In an old case it was held that when one possessed of a term for 40 years granted to J as many of these years as should be arrear at the time of his death, the grant was void because of the uncertainty both as to commencement and duration, and was not like the case of a grant to a man for life and to his executors for four years after his death, which gave the executors a certain term though the time of commencement was left to be ascertained by a future event, whereas in this

(1) Eastman v. Perkins, 111 Mass. 30.

(2) Remington v. Casey, 71 Ill. 317.

case if the grantor should live the whole 40 years there would be no term (3). In a Massachusetts case (4) the owner was allowed to recover possession, on the ground that the lease was void for uncertainty of both commencement and duration, where the defendant had gone into possession under a letter written him by the plaintiff in these words: "I hereby let you the whole of my house on Mercer street in South Boston, when said house is suitable to be occupied by you, for a rent of $480 per annum, but it is to be understood that in case, after two years subsequent to your moving into the house, I should wish to live in the house myself, I can do so, and that then you may still retain, if you wish (certain rooms mentioned) for such a time as may be agreeable to us both." It would have been a good lease for two years notwithstanding it was to begin when the house was made fit to occupy and possession taken, the court thought; but the fact that it was to continue for an uncertain time after the two years expired unless the lessor should desire to take possession was held to destroy the certainty entirely.

§ 15a. **Other formal requirements.** A revenue stamp has at times been required by statute on penalty of not being admissible in evidence. Delivery of the lease by or for the lessor, and acceptance, express or implied, by or for the leseee, are essential to give it effect. Acknowledgement by the lessor before a notary is often made essential to entitle the lease to record where there

(3) Brooke, Abridg. Tit. Leases, 66.

(4) Murray v. Cherrington, 99 Mass. 229.

is a statute requiring such instruments to be recorded to be valid against persons without notice of them.

§ 16. **Effect of entering on void lease.** Though the lease may not be so executed as to be valid it will at least operate as a license, so as to prevent the lessor maintaining any action against the lessee for a trespass in entering. It will also operate as a good lease at will or from year to year, though void under the statute as to the term agreed on because not in writing and signed as required. Though it is void as to the term, it is valid in all other respects, such as the time of year that the rent shall be paid, the obligation to pay, the amount of the rent, and the time of termination. In an action of ejectment it appeared that the plaintiff's agent leased the farm to the defendants by parol for seven years, who entered and paid an installment of rent accordingly. Afterwards the plaintiff gave notice to quit on Lady-day, which would not be the time for termination of a year, wherefore he was non-suited, and, on motion to set aside the non-suit, the motion was dismissed. The court said: "Though the agreement be void by the statute of frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of year when the tenant is to quit, etc. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it is agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor chose to deter-

mine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas" (5).

§ 17. When part performance will validate oral leases in equity. Moreover, parol leases for more than a year, and parol contracts to execute leases in the future for a longer period, may, like other parol contracts concerning interests in land, become enforcible in equity without complying with the statute, by reason of the part performance of the oral contract, and the fraud and injustice that would be visited on one of the parties by permitting the other to avoid it on a technicality after he had permitted the other to alter his position so that irreparable injury would be inflicted. The mere payment of rent will not make an oral lease for more than a year valid for the full term; but taking possession under the lease will, in most states. Some require, in addition to possession, the payment of rent or expenditures in making improvements upon the property. What acts are sufficient for this purpose is treated in the article on Equity Jurisdiction in Volume VI of this work.

§ 18. Lease or agreement for lease. It is often a point of doubt whether the instrument executed by the parties was a lease or an agreement for a lease. If it was merely an agreement for a lease to be executed in the future, the proposed lessee acquired no interest in the land at law by the writing, could not maintain an action of ejectment on it to recover possession against the lessor, nor even defend and retain the possession against an action for the possession by the lessor against him

(5) Doe d. Rigge v. Bell, 2 Smith's Leading Cases, *72.

in case he has taken possession; and on the other hand, this preliminary contract would not sustain an action by the lessor for rent. Whether the instrument is a lease or a preliminary contract is merely a question of intention to be gathered from the terms of the instrument and the construction which the parties have given it. That the lessee has taken possession under it is indicative that it is a present demise; that he has paid and the lessor accepted rent is even stronger evidence in the same direction. That possession has not been taken under it might afford some, though but slight, indication of a contrary intention; but in this case the question must be decided principally on the terms of the writing. Where the terms are uncertain, as "subject to the usual covenants," as to which there might be a difference of opinion, this tends to show that the parties intended that a more formal instrument should be drawn and that the present writing is merely an agreement for a future lease. If the instrument shows that the party intending to make the lease has no power yet to make it, the same inference would follow. But if it appears that the writing was intended to give possession it may operate as a lease though its form is "agrees to let," or the possession is not to be taken till a future time, or the house leased is yet to be built. Agreement for the execution of a future instrument is most indicative that the present instrument is not a lease. "Demise, lease, and to farm let" or other words of present demise, are most indicative that a lease is intended.

§ 19. **Agreement for lease: Usual covenant.** An

agreement to make a lease entitles both parties to have the lease made accordingly and accepted. If the preliminary agreement does not specify what covenants the lease shall contain, the parties are entitled to have a lease with the usual covenants, and what are the usual covenants depends on the practice in the particular community; but if the parties have designated in the preliminary agreement what covenants shall be included, or specified what they consider the usual covenants, no others can be demanded. Among the most common covenants may be mentioned promises that the lessee shall pay rent, keep and return the premises in repair; and that the lessor shall have a right of entry to inspect the condition of the premises, shall pay the taxes, and secure quiet enjoyment to the lessee. Covenants held not to be within the usual covenants are promises by the lessee to rebuild in case of accidental destruction, not to assign nor sublease, not to conduct a particular business on the premises, to insure, that rent shall cease in case of destruction, that the lessor shall have a right of entry if the rent is not paid or other covenants are broken by the lessee, etc.

§ 20. **Same: Remedies for breach of.** Refusal to take or give the lease as agreed entitles the other party to sue for and recover damages he may suffer from the breach; but before bringing such an action the party intending it should make a direct demand for the lease, or tender such a lease as he is entitled to have accepted. Demand of a lease to which the party is not entitled, tender of a lease such as the other party is not bound to accept, or

either before all conditions have been performed which the agreement imposed on the party contemplating the suit, will be of no avail. If the lessee refuses to accept the lease, the remedy of the owner at law is an action for damages, though in equity he may compel the lessee to accept the lease; and if the lessor refuses to make the agreed lease the lessee has similar remedies. If the lessor has not the whole premises to grant, the lessee may have specific performance to the extent that the lessor has title to give it, and may have a decree for abatement of the rent in proportion and for damages for the loss of the residue of the property. Even where specific performance as to the whole is decreed, the lessee may have a decree also for such damages as he has suffered from the delay in obtaining it by a decree. The damages recoverable for breach of the agreement by either party are the value of the agreement to the other; to the lessor, the loss on the rent if the premises can be leased to anyone else, and, if not, the whole rent less what the owner was able to realize from the use of them himself; to the lessee, the difference between the agreed rent and the rental value of the premises, plus such sums as he has expended in improvements, repairs, and in preparing to take possession, and, in some cases, prospective profits from the occupation where these can be proven with sufficient certainty. See the article on Damages in Volume X of this work. If he paid a fee, bonus, or commission to get the lease, he is entitled to recover that.

§ 21. **Implied covenants: Condition of premises.**

There is no implied covenant that premises leased are fit for the purpose for which they are hired, whether for cultivation, habitation, manufacture, or trade. There is no implied covenant that they are tenantable, or even safe. There is no implied promise that the lessor will put or keep them in repair. In England and Massachusetts it has been held that the implied warranty of fitness in the sale of chattels for a special purpose extends to the lease of furniture, so that in a lease of furnished apartments or a cottage for a short term there is an implied covenant of tenantableness, which justifies the tenant in abandoning and refusing to pay the rent if the place is so infested with vermin as to be uninhabitable, and so of similar defects. But in a number of the other states the soundness of this distinction has been doubted or denied.

In an action for rent of a furnished house at a seaside resort for five months for a rent of $325 payable in advance, the defense was that ten days after taking possession the defendant abandoned the place because the cellar was filled with water which came up through a hole in the cement floor of the cellar, so that the house was too damp for habitation, and that he had notified the plaintiff in writing at the time of quitting. The court reviewed the English decisions, and held that the facts alleged constituted no defense (6). But where apartments were leased for five years "to be occupied for lodge purposes, and in no case to be used for any business deemed extra hazardous on account of fire," and in

(6) Murray v. Albertson, 50 N. J. L. 167.

an action for the rent the defendants set up that they had abandoned because the walls and floors were not sufficiently deadened to render the place suitable for lodge purposes, and that the lease had been taken in consequence of a previous promise by the lessor to make them fit (which the trial judge held to be superseded because not put into the written lease), and that in an effort to make the place suitable the plaintiff had taken up the floor and neglected to replace it, the supreme court held that the defense was good, saying: "As the use was designated, the floors of the room had to be deadened, as was well understood by the plaintiff; and, as soon as complaint was made that it was insufficiently done, he recognized his duty in the premises, and promised to remedy the defect. This he failed to do; and after the defendants had waited, as they claim, a reasonable length of time for him to make the change, and the plaintiff still failing to perform his promise and make the same, they surrendered up the premises to the plaintiff and removed therefrom. . . . When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specific purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for the purpose in the condition it then is, if there are no modifying clauses to the contrary contained in the lease; and it should be so held; otherwise there would be no consideration for the tenant's agreement to pay rent" (7).

(7) Young v. Collett, 63 Mich. 331.

When the landlord assures the tenant that the premises are in good condition in any respect to induce him to take the lease, or with knowledge or suspicion of any defect resorts to any artifice to prevent the proposed tenant from discovering the defect, there is a substantial fraud which will enable the tenant to avoid the lease and defeat an action for the rent; and if the landlord conceals a dangerous condition the tenant may recover any damages he suffers therefrom (8). See § 50, below.

§ 22. Same: Possession, enjoyment, and so forth. There is an implied covenant or promise from every lease which has nothing express on the subject that the lessee shall be allowed to take possession without molestation or hindrance by the lessor or any other, and that he shall have the quiet enjoyment of the premises during the whole term. If possession is withheld, the lessee may, after making formal entry, bring ejectment against the lessor or other persons restraining him, and recover possession and damages to the value of the term for the time lost, but not generally any prospective profits he hoped to make in business on the place. The landlord is not bound to put the tenant into possession, and is not liable for trespasses committed by strangers during the term.

There is also an implied promise on the part of the lessee that he will pay the reserved rent and observe the other stipulations of the lease, whether he signed it or not, commit no waste, and that at the end of the term he will redeliver the possession to the lessor.

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(8) Milliken v. Thorndyke, 103 Mass. 385.

§ 23. **Interpretation of leases: General rules of construction.** The general rules of construction of all written instruments apply to leases, viz.: the object is to find the intention of the parties, which is primarily to be gathered from the instrument as a whole and not from single expressions; a reasonable and lawful intention is to be presumed in preference to an unreasonable or unlawful one; such a construction is to be given as will give effect to the whole instrument and reconcile all its provisions if possible, but if impossible the first provision prevails over the later one, except that when one is printed and the other is written the written clause controls, as the more likely to express the true intention of the parties; doubts are to be resolved in favor of the lessee, because the writing is furnished by the lessor and is supposed to be his language; words are to be understood according to their ordinary meaning, except that technical and trade terms are to be given their technical or trade meaning; the court will consider the relations of the parties to each other and the property, and receive evidence of the circumstances under which the lease was made to enable the judges to put themselves as nearly as possible in the position of the parties and see things and interpret language from their point of view, but will not listen to what the parties now wish to say they intended by the language they used; the construction agreed to and acted on by the parties is correct; the whole contract is presumed to be contained in the writing, and all prior negotiations, terms, and stipulations are presumed to have been abandoned unless incorporated in

the writing; but subsequent modifications supported by sufficient consideration are binding though not indorsed on the lease nor reduced to writing. An independent prior contract may be proved to explain the lease though the prior contract was merely by word of mouth.

§ 24. **Same: Length of term. Description of property.** A lease may be made to begin as from a past date, and a dated lease is presumed to begin from the date, an undated one from the delivery of it. Conflicts between the length of the term granted and the time the lease is to end as stated in the lease are charged to error in computation, and it is held to be a lease for the length of time granted, and the time for ending must yield. Where there are two descriptions of the premises leased and they do not agree, the estimate of the number of acres must yield to the description by location or name; in descriptions by metes and bounds, courses and distances are controlled by the monuments referred to; a grant to a street or stream extends to the middle of it if the lessor owns so far; a false description does not vitiate, if there is a sufficient description without it. A lease of a house by street and number includes the lot on which it stands and the appurtenant out-buildings; a lease of rooms and apartments includes the right of way thereto from the street; a lease of a building includes the right to use the outer walls for advertising purposes. A lease of the mines on land described where no mines are opened includes the right to open any mine for any mineral on any part of the premises; but if there are opened mines, the lessee has no right to open new mines,

A lease of a farm does not pass the right to open a mine on it. A lease of land on which crops are growing passes them to the lessee unless the crops are expressly reserved.

§ 25. **Same: Dependence of promises of parties.** If covenants are independent one party may sue and recover for a breach by the other party though he has not performed his own covenants yet; but if they are dependent, suit before performance by the plaintiff is premature. Whether they are dependent is determined by express provision, or more often by the rule that if they are to be done concurrently, one for the other, they are dependent; if they are to be done at different times, if the covenantor has had the benefit of the covenant on his part, or a penalty for breach is provided, they are independent. The landlord must perform before he can sue on a contract to repair with materials to be furnished by the lessor, to keep in repair after the lessor has repaired, or to pay rent after being given possession. He may recover the rent though he has not kept his promise to keep in repair during the term.

Section 2. Covenants in Leases and Their Effect.

§ 26. **Covenant for quiet enjoyment.** As stated, a covenant for quiet enjoyment is implied from the fact of lease; but this implied covenant may be extended or restricted to a great extent by express provision. There can be no recovery for breach of a covenant for quiet enjoyment, either express or implied, without an actual or constructive eviction of the tenant or one holding through him. What acts will amount to an eviction is

often difficult to determine. It has been held that the covenant is not broken by the mere existence of an outstanding paramount title, where the lessor acted in good faith and the lessee has enjoyed the possession undisturbed during the term, nor even though an action of ejectment has been commenced against him, there being no other evidence or acts of eviction. In a Massachusetts case an action for damages for breach of the covenant for quiet enjoyment was held not sustainable, the court saying: "Of the parties to these actions between landlord and tenant, the latter, having remained in possession until the end of the term demised, now alleges as an eviction the fact that during the term his landlord entered on the premises under a claim of right to repossess them for breach of covenants by the tenant, on which final judgment for the tenant was rendered; and he further alleges as breaches of the implied covenant for quiet enjoyment, the same entry and suit, and the fact that the landlord, knowing that the premises were of value to the tenant only for his business of common victualler and seller of liquors, caused the license commissioners to refuse him a liquor license, and also caused his license as a common victualler to be taken from him wrongfully and without right. None of these acts were an eviction of the tenant, nor an ouster equivalent to an eviction, for the reason that he remained in the occupation of the premises until the end of his term; and for the same reason, if for no others, none of them worked a breach of the implied covenant for quiet enjoyment. The entry was a formal one, not interrupting the ten-

ant's occupation, and doing him no damage. The process was not a malicious suit, and for it his costs as the prevailing party are his only remedy. Assuming that the entry was an unjustifiable attempt to oust the tenant, which, if he had yielded, would have been an eviction, and a breach of the covenant, as he did not yield, the entry was at most a trespass, for which he might recover nominal damages in a suitable action, but not in this present suit, which by his declaration he has elected to treat as an action of contract for breach of covenant. The alleged acts of the landlord with reference to the tenant's licenses from public authorities had no tendency to interrupt, and did not interrupt the tenant's possession'' (9).

§ 27. **Same (continued).** In a number of cases the courts have given the tenant judgment for damages for a breach of the covenant for quiet enjoyment though he remained continually in possession. So where the tenant leased part of a house and the landlord later suffered prostitutes to occupy the rest of the house openly; or, when the lease was of the bar of a hotel with covenant by the lessor not to sell liquors in the house during the term of the lease, and the lessor later built a wall shutting off access to the bar from the hotel and built and opened a bar on the other side of the house in an annex; and such a covenant was held to be broken by a lease of the same premises by the lessor to another before the plaintiff's lease and covering his term (10). On the other hand,

(9) International Trust Co. v. Schumann, 158 Mass. 287.

(10) McAlester v. Landers, 70 Cal. 79.

it has been held that this covenant does not include a covenant to repair, and is not broken by the premises becoming untenantable for want of repairs, nor by the existence of restrictions upon the use encumbering the lessor's title and enforced against the lessee, nor by the taking of the premises from the tenant by eminent domain proceedings even though prosecuted by the lessor (11). An actual eviction by a paramount title or by the lessor or anyone claiming under him would undoubtedly be a breach of the covenant for quiet enjoyment; and by the greater weight of authority interference which prevents the tenant ever acquiring possession is a breach of this covenant, whether this restraint be exercised by the lessor's sanction, by a paramount title, or by the unlawful act of a stranger. But if the tenant once gets peaceable possession, no subsequent unlawful eviction by a stranger without the lessor's sanction will be a breach of the covenant for quiet enjoyment. It was even held that such a covenant in a lease of land in America was not broken by the fact that the unwarranted ouster by the revolutionists during the term was later sanctioned by the English government making a treaty of peace with them by which it acknowledged the independence of the colonies (12).

§ 28. **Same: Assignees. Damages.** The covenant for quiet enjoyment runs with the land and the reversion, so that the lessee's assignee may sue for a breach of it after the assignment, and the lessor's grantee is liable

(11) Goodyear S. M. Co. v. Boston T. Co., 176 Mass. 115.

(12) Dudley v. Folliott, 3 Term Rep. 584.

for breaches of it by his permission. The damages generally allowed on recovery for breach of this covenant are the value of the lease above the rent due to the defendant; and the plaintiff may also recover the costs paid by him in defending the action by the holder of the paramount title on which the tenant was evicted and the damages he was compelled to pay in such suit to the holder of the better title for mesne profits.

§ 29. **Covenant for further assurance.** This covenant, to execute at any time such further writings and conveyances as may be necessary to pass the title for the term contracted, or as the lessee may be advised is necessary for that purpose, is not much used. Under this covenant the lessee may require the removal of a judgment incumbering the premises, or the conveyance of any title acquired by the lessor after making the lease, so far as is necessary to make good the term leased. This covenant is not broken by refusal of the lessor to execute writings which would be nugatory and useless.

§ 30. **Covenant against incumbrances.** This covenant —"that the premises are free from all incumbrances" —is a covenant against any right or interest in the land which may subsist in any third person to the diminution of the value of the land to the lessee but consistent with the passing of some title by the lease. It is one of the greatest practical importance; it is broken the moment it is made, if at all; the statute of limitations immediately begins to run against it; by the majority of courts it is held to be personal, so as not to run with the land or be available to the assignee of the lease; and it

is broken by the existence of any outstanding option, lease, mortgage, easement, restriction on the use, rent charge, tax, inchoate right of dower, or other like right, legal or equitable, whether known to the lessee at the time of taking the lease or not, and without any disturbance of his possession by the person holding such right. It is held not to be broken by the existence of such an obvious public easement as a highway across the premises, in actual use and known to the lessee.

§ 31. **Covenants of seizin and right to convey.** These covenants also are held to be purely personal; broken as soon as made if at all; immediately begin to outlaw; and are not available to or against any but the parties. These covenants usually amount to the same thing, but one may have right to convey by virtue of a power without being seized. The advantage of these covenants to the lessee is that he may sue because of an outstanding title, which would not amount to a breach of the covenant for quiet enjoyment because not asserted.

§ 32. **Restrictions upon the use and cultivation.** In the absence of any express provision in the lease, the tenant takes the premises subject to any restrictions as to use that were binding on his lessor, and the further obligation to do nothing that will amount to waste or nuisance, and in the cultivation of the lands to observe the rules of good husbandry according to the custom of the country. He has no right to remove from the premises manure made from the products of the soil leased, but should return it to the land to maintain its fertility. Manure made from feed brought onto the

premises he may remove if it has not been mixed with manure made from the products of the farm. If the lease has been obtained by fraudulently inducing the lessor to suppose that the premises are wanted for a particular purpose only, a court of chancery will, at the suit of the lessor, restrain other uses injurious to the lessor, though nothing was said in the lease about it. A lease of premises "to be used for" a particular purpose named will also restrain the right of the lessee to use them for other purposes, though there is no express clause of restriction as to the use; but the fact that the lease grants the lessee expressly rights he would not have but for such grant, such as to put down wells for the manufacture of salt, or to open a quarry on the land leased, does not restrict the right of the tenant to use the premises for any lawful purpose other than the one specified.

The right of the lessee to use may be, and often is, restricted further by provisions inserted in the lease, that the premises shall be used only for a private residence, that no business or no dangerous or offensive trade shall be conducted on the premises, that the lessee shall personally reside on the place during the term, and the like. All these restrictive clauses are given a reasonable but strict construction. A covenant against carrying on an offensive trade does not prevent conducting such a dangerous trade that insurance against fire cannot be obtained on the building; and in determining what is an offensive trade the court will consider the character of the neighborhood and the use to which the premises have been put in the past. A covenant to use the prem-

ises only for a residence for the lessee himself is not broken by his marrying and living there with his wife, children, and house servants; nor by selling at auction on the place the furniture that has been used there.

Covenants restricting the use of the premises run with the land and the reversion, so that they may be enforced by the grantee of the lessor and against the sublessee and the assignee of the lessee. The lessee may be held liable on his contract for a breach by himself or any claiming by assignment or lease under him, to the amount of the damages resulting therefrom, and a court of equity will restrain him and all others from threatened violations, and in the same suit award damages for past wrongs. If the provision is a condition instead of a covenant not to do the thing, the lessor may on that ground enter and terminate the lease as for a forfeiture.

§ 33. Option to terminate, renew, or purchase. The mere fact of lease gives neither party the option to terminate, renew, or purchase; but such stipulations in leases are common. Whether the provision is merely optional with the one party, or a covenant enforcible by the other, is a question of construction determined by the rules before stated (§ 23). Whether it be an option or a covenant it runs with the land and the reversion. An option to purchase, renew, or terminate given to the tenant may be exercised by his assignee against the lessor or his grantee. Such an option reserved by the lessor may be exercised by his grantee against the lessee or his assignee. If the option is subject to conditions, these must be performed or tendered before performance

by the other party is demandable. Such stipulations are not void for want of mutuality. The granting of the lease is sufficient consideration for the tenant's agreement that in case of sale by the landlord the lease may be terminated without notice. The acceptance of the lease by the tenant and his promise to pay rent furnish sufficient consideration for the lessor's promise that the tenant may terminate at a specified time or have a renewal on stated terms, or purchase at a stated price. Such provisions are not valid unless they specify the price to be paid for the conveyance, the property which is to be conveyed, and so forth. Where the time during which the option may be exercised is not specified it may be exercised at any time during the term and not afterwards. If the time is specified, the termination of the lease in the mean time by a conditional limitation does not necessarily terminate the option; but if the lessee forfeits his term the option falls with it (13). If the lease requires notice of the exercise of the option to be given, the notice should be given to the person then having the title affected by it. Covenants expressly for perpetual renewal are valid, but the courts do not favor them, and construe a covenant merely for renewal as a covenant to mean one renewal on the terms of the first lease.

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(13) Ober v. Brooks, 162 Mass. 102.

CHAPTER III.

TRANSFERS OF THE TERM, REVERSION, LEASE, OR INTERESTS THEREIN.

§ 34. What covenants run with the land and reversion. In an English case which has always been regarded as a leading authority on this subject, Spencer leased land with a covenant that the lessee should build a wall on a certain part of it. The lessee assigned his term to J, and he assigned it to another, whom Spencer sued for not building the wall within the time limited. The action was held not maintainable, and in this case the judges laid down many rules as to when covenants run and when they do not, and among them the following:

"1. When the covenant extends to a thing in esse [in being], parcel of the demise, the thing to be done by force of the covenant is quodammodo [as it were] annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, though he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract and extends to the support of the thing demised, and therefore is quodammodo annexed appurtenant to houses and shall bind the assignee although he be

not bound expressly by the covenant; but in the case at bar the covenant concerns a thing which was not in esse at the time of the demand made, but to be newly built after; and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

"2. It was resolved that in this case, if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that, forasmuch as it is to be done upon the land demised, it shall bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns by express words, the assignee shall take benefit of it. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged; as if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is not parcel of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral and in no manner touches or concerns the thing that was demised or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it no more than any other stranger.

"3. It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things let were or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in repect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors and administrators, who represent him" (1).

§ 35. **Same: Comment and illustrations.** While the propositions thus stated in this old case have in the main been adhered to since, the importance of the insertion of the word assigns is not admitted by all courts; and it has been held in several cases that a covenant by a lessee to build on the demised premises by such a time is as binding on his assignee, without insertion of the word assigns, as would be a covenant to keep in repair a building already on the land; and in substance it is not easy to see how there is a distinction between a covenant to improve land now in being by building on it, and a covenant to improve the same land by shingling or painting a house already on the land.

Regarding the rule that a covenant concerning the land shall run with the land, there is no exact criterion to de-

(1) Spencer's Case, 5 Coke, 16a.

termine what things concern the land, and it is not always easy to decide. The decisions are not entirely in harmony, and the discussion of this topic may as well be closed by saying that it has generally been held that the following and the like covenants run with the land and the reversion: covenants to repair, to renew the lease, to renew perpetually, for quiet enjoyment, not to assign, not to sublet, to return the land as well stocked as at the beginning of the lease, not to commit waste, not to carry on a certain dangerous trade, to insure, to build a mill suitable to mill the ores from the lessor's adjoining land, to pay taxes, to pay rent, or to purchase improvements to be made by the tenant. An agreement not to exercise a trade in competition with the lessor has been held not to run to bind the assignee. The lessor may secure the same result from even a covenant that will not run with the land, by inserting in the lease a condition or covenant against assigning without the written consent of the lessor, which, if ever needed, may be given on the like terms so as to avoid the rule that a condition once waived is gone forever.

§ 36. **Power to assign, sublet, mortgage, etc.** In the absence of restraint by statute or provision in the lease, a lessee may assign, sublet, or otherwise dispose of his term and interest, without any assent by the lessor, or against his objection; and his assignee, sublessee, or mortgagee, may likewise, in the absence of such restrictions, assign, sublet, or mortgage the whole or any part of his interest. But of course none of these transactions give the assignees or subtenants rights against the lessor

superior to those held by the tenant, nor bind the reversion further than it is bound by the terms of the lease. There are statutes in a few of the states forbidding transfers by tenants without the consent of the lessor: in Kentucky, Missouri, and Kansas, if the lease does not exceed two years; in Georgia, if it does not exceed five years; in Texas, irrespective of the length of the term. The Missouri statute is held not to prevent subleases; the contrary is held in Texas. If a transfer is made in violation of the statute the landlord may have the assignee or subtenant enjoined from trespassing on the land, or may waive the objection and hold him and his goods in action or distress for the rent (2).

§ 37. **Attornment** is the act of the lessee or tenant, in recognizing the grantee of the reversion as his landlord, and may be by express words or by such implication as payment of rent to him. At common law, attornment was essential to enable the grantee of the reversion to sue for the rent; but this difficulty was evaded by making a transfer by fine, or later by a conveyance operating under the statute of uses, 27 Hen. VIII, c. 10, and finally the necessity for attornment was abolished by statute, 4 Anne, c. 16 (1705). In this country some courts have held that attornment is not necessary; in some the statute is given effect by a sort of equity though it was enacted since the settlement of this country; and in some states it has in effect been re-enacted, so that now attornment is not necessary to a complete grant of the re-

(2) Forrest v. Durnell, 86 Tex. 647; Moore v. Guardian Trust Co., 173 Mo. 218.

version in most of the states. If there is a sublease instead of an assignment (§ 6, above), neither the lessor nor his heirs, assigns, or grantees can maintain any action on the covenants of the tenant's subtenants to pay him rent. They are the tenants of the tenant, and he is entitled to the rent they are bound to pay. If the first tenant dies, his representatives may sue for the rent; and if the first tenant assigns the reversion of his term the rents of the subtenant are incident to the term and pass with it.

§ 38. **Assignment, sublease, and mortgage distinguished.** An assignment of a tenant's term is a transfer of his entire interest. If he parts with his whole interest in the whole property, that is an assignment of the whole; if he parts with his whole interest in a part of the property leased, that is an assignment as to so much. If he rents parts of it to different persons for his whole term, then such persons, to the extent of their holdings, are assignees. If the new tenant takes the land for a shorter time than the lessee has he is a subtenant and not an assignee; he is a tenant of the lessee, not of the lessor.

In an action of ejectment by the lessor to recover possession because of an alleged subletting without his consent in writing, contrary to the terms of the lease, the court said: "The first question is, did the lessees sublet the premises without the written consent of the lessor. They executed an instrument to Bower, by which they gave him the right in the premises for two years and seven months, and a privilege for four years longer by his giving two months' notice. The defendant contends

that this is not a sublease, but that it is an assignment of the lease to them, or of their term. It is said that when a lessee conveys his whole estate to an alienee, the conveyance amounts to and is called an assignment; and that the distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. An assignment creates no new estate, but transfers an existing estate into new hands; an under-lease creates a perfectly new estate.

"In this case, these general principles will not entirely satisfy, and we must learn how they have been applied in particular instances. We find that though a lessee make an instrument, which by its terms conveys the whole of his interest in the premises, if he reserve to himself a reversion of some portion of the term, it is an under-lease, and not an assignment. It has accordingly been held, that though the instrument dispose of the whole unexpired term, if it contain a covenant to surrender the premises on the last day of the term it is an under-lease and not an assignment. And again, if there be a right reserved to the lessor to re-enter on breach of conditions, this makes a sublease. So it has been held that a reservation of a new rent makes the instrument a sublease. Undoubtedly the chief of these is the reversion of some portion of the term. Therefore though the instrument executed to Bower does, in the term of two years and seven months demised and in the privilege for the further term of four years, cover the whole unexpired term demised by the plaintiff to the

Bronners; yet it is a sublease and not an assignment. It is in the form of a lease; it reserves to the Bronners rent at a new rate and at a new time of payment; it stipulates for a right of re-entry on nonpayment of rent, and on the breach of certain conditions contained in it; it provides for a surrender of the premises to them on the expiration of the term. Thus the Bronners did not part with their whole interest in the premises and in the lease thereof to them'' (3).

Thus it appears that an assignment is a transfer of the lessee's term; and a subtenant is one who leases all or part of the rented premises of the lessee in such a way as to leave a reversionary interest in the original lessee, and this is most surely done by a lease for a less term than the lessee had. A mere permissive use of the land which amounts to nothing more than a license is not a breach of a stipulation against subletting, nor is such a provision broken by the lessee putting his servant or agent in possession and charge of the premises. The substance of the transaction and not the form of the paper determines the question as to its character. A transfer in the form of an assignment is a mortgage if it was in fact made, not to pass the estate, but to secure payment to the transferee of a debt due him from the lessee, to whom a re-transfer is to be made upon payment.

§ 39. **Restrictions upon transfer: Strictly construed.** Restrictions upon transfers by lessees in fee simple are void on grounds of public policy, as tending to create perpetuities; but restraints on transfers by tenants for

(3) Collins v. Hasbrouck, 56 N. Y. 157.

life or years are not open to that objection. All restraints upon alienation are, however, construed strictly. A condition or covenant against assigning is not violated by subletting; a stipulation against subletting is not broken by assigning; a stipulation that the lessee shall not assign is not violated by the bankruptcy of the lessee; nor by an assignment by his administrator or executor; nor by a sale on execution against him; nor even, one court has held, by his giving a mortgage on it and allowing the mortgage to be foreclosed. A stipulation that neither he nor his representative shall assign to a person named is not violated by his assignee or subtenant assigning to such person.

§ 40. **Same: Provisions for forfeiture.** A provision in the lease for an entry and forfeiture of the lease in case of violation of the restraint on assignment and subletting is of the highest importance to the lessor. A mere provision in the lease that the lessee shall not assign is only a covenant at best, for the breach of which the lessor would have an action against the lessee, and in most cases would be able to recover only nominal damages. Such a covenant would not render the assignment void, nor in any way restrict the estate acquired by the assignee, except that it would prevent him acquiring the right to sue the lessor on such covenants in the original lease as would, but for the covenant not to assign, accrue to his benefit, such as covenants running with the land. But a provision amounting to a condition, for the breach of which the lessor may enter and forfeit the term, is a real restraint, which in ordinary cases will prevent any at-

tempt at violation, and, in the exceptional case in which there is a violation, will afford the lessor real redress.

And yet conditions are construed even more strictly than covenants when they restrain alienation, for the very reason that they cause a forfeiture in addition to the fact that they restrain trade and commerce. All that has been said of the strict construction of covenants against alienation applies with added force to such conditions. An assignment in violation of the condition is waived and confirmed by the lessor accepting rent from the assignee with knowledge of the assignment, and the lessor cannot thereafter claim a forfeiture for breach of that condition; but he may still sue the lessee for breach of his covenant. Such conditions are also generally held to be indivisible; and if one assignment is permitted or waived the condition is gone forever. Where a lease is made to three, subject to the condition to be void if an assignment is made without the consent of the lessor, and the lessor later consents to an assignment by *one* of his interest, the others may afterwards assign without his consent, and he can claim no forfeiture for it.

§ 41. **Same: Effect against assignees.** If one covenants for himself and his assigns not to assign, an action may be maintained against the lessee's assignee for breach of the covenant, for it is one that runs with the land and the reversion. In one case the court said: "The alleged assignment was without the assent of the lessor. The lease contained a provision prohibiting the assignment without the written assent of the lessor; but it is urged that the condition was wholly discharged by the

leave given to McCabe to assign the lease to the appellant, and that the covenant against assignment without written consent became exhausted by one consent to assign. . . . The assent declared that the assignment should be subject to each and every covenant, condition, and provision of the lease, and expressly provided that no further assignment 'of the said lease shall be made without written consent;' and the law has no arbitrary rule that, under an assent so conditioned, the assignee who has accepted such assent, and enters into possession thereunder, is discharged from the condition of the lease and the assent, and may assign the lease at will" (4).

§ 42. **Effect of assignment: Between lessor and lessee.** The lessee is as liable to the lessor on the covenants of his lease for rent accrued and to accrue, and on the other covenants, after as before the assignment. Upon covenants implied merely from the relation of tenancy and not expressly set forth in the lease he is no longer liable. In a celebrated old English case (5), in an action by the lessor against the lessee for rent accrued after the assignment the defendant claimed that by the assignment he was relieved of liability for future rent. But on great deliberation and conference between all the judges, it was held that by the assignment the lessee was not released from the obligations of his contract; and the court held that there are three kinds of privity by which men may be bound to pay, viz.: privity of contract, privity of estate, and privity of contract and estate combined.

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(4) Springer v. Chicago Real Estate L. & T. Co., 202 Ill. 17.

(5) Walker's Case, 3 Coke, 22a.

"Privity of contract only is personal privity, and extends only to the person of the lessor and to the person of the lessee, as in the case at bar when the lessee assigned over his interest; notwithstanding his assignment the privity of contract remained between them, though the privity of estate be removed by the act of the lessee himself. And the reason thereof is: first, because the lessee himself shall not prevent by his own act such remedy which the lessor has against him by his own contract; but when the lessor grants over his reversion, there, against his own grant, he cannot have remedy, because he has granted the reversion to another, to which the rent is incident. Secondly, the lessee may grant the term to a poor man, who shall not be able to manure the land, and who will for need or for malice suffer the land to lie fresh, and then the lessor will be without remedy either by distress or by action of debt, which would be inconvenient. Privity of estate only: as if the lessor grants over his reversion or if the reversion escheat, between the grantee (or the lord by escheat) and the lessee is privity of estate only; so between the lessor and the assignee of the lessee, for no contract is made between them. The privity of contract and estate together is between the lessor and the lessee himself [before assignment of the lease]. . . . If after the assignment of the lease the lessor grants over his reversion, the grantee shall not have an action of debt against the lessee, for the privity of contract as to the action of debt holds only betwixt the lessor himself and the lessee himself; so in such case if the lessee dies, the lessor shall not have an

action of debt against his executors, for the privity consists only between the lessor and the lessee."

§ 43. **Same: Between lessor and assignee.** An assignee is liable to the lessor and his grantee by virtue of his privity of estate, on all the covenants that run with the land, and for all breaches occurring while he has the estate, such as the covenant to pay rent, make repairs, or cultivate the premises in a particular manner; but he is not liable for any breaches of these covenants which occurred before he acquired the premises or after he disposed of them. By again assigning he does not avoid liability for breaches while he held. In an action against an assignee of a lease for rent, he defended that he had assigned before the rent accrued. The original lease contained a covenant not to assign without the consent of the lessor; when the defendant took the assignment the consent of the lessor was given on condition that the assignee should not assign without the lessor's consent, to which the defendant assented. The court said: "It is well settled that by virtue of the privity of estate between the assignee of the leasehold and the lessor, such assignee becomes personally liable to the lessor while he holds the estate as assignee, for the performance of the lessee's covenants which run with the estate. . . . By accepting the assignment of the lease, and the written assent of the lessor, Harding, in virtue whereof the assignment became effective, and entering into possession of the premises thereunder, it must be held the appellant held possession as assignee under the terms and conditions of such assignment and written assent, and that he

thereby assumed the position of McCabe, the original lessee, so long as he remained assignee of the lease, and became obligated to perform the covenants and conditions of the lease in as full and complete a manner as the original lessee, McCabe'' (6).

§ 44. **Effect of sublease.** A sublease does not affect the existing liabilities between lessor and lessee, save that the possessory rights of the latter have been transferred to the sublessee in possession. As between lessor and subtenant, the latter is not personally liable to the lessor on any covenants of the lease express or implied; because there is neither privity of contract nor of estate between them. The subtenant does not hold the estate created by the lease but the new estate created by the lessee. And yet he takes the land subject to all the burdens under which the tenant held it, for the latter could not pass a better estate than he has. If there are any acts named in the lease the doing of which is therein declared to be a condition for the breach of which the lessor may enter and terminate the lease, he may make such entry for the doing of the act by the subtenant, and thus the subtenant will lose his estate. If by the statute of the state or the terms of the lease the landlord has a lien on the crops raised on the land to secure the payment of his rent, or has the right to seize the goods of the tenant as a distress to enforce payment, the crops and goods of the subtenant are liable to be so taken. But if the landlord, the lessee, and the new tenant agree together that the new tenant shall take the place of the old,

(6) Springer v. Chicago Real Estate L. & T. Co., 202 Ill. 17.

it amounts to a surrender of the old lease and the granting of a new to the new tenant on the terms of the old; whereby the lessee is absolutely released from further liability and the assignee becomes bound in contract to perform the promises of the lease, so that he cannot escape by an assignment.

§ 45. **Rights between lessee and subtenant or assignee.** As to the rights between the subtenant or assignee of the lease and the lessee after the making of the lease or assignment, they are liable to each other for the performance of their respective duties. If the lessee is compelled to pay to the lessor by reason of waste committed by the assignee or subtenant, or for his failure to pay the rent, keep the premises in repair, or the like, such payment entitles the lessee to maintain an action against the assignee or subtenant for reimbursement. On the other hand, if the subtenant is compelled to pay rent to the overlord, his lessor's lessor, to save his term, or to redeem his goods from a seizure for rent as a distress, this payment entitles him to recover this amount from his lessor, the original lessee. If his title fails the assignee can recover of the lessee the money paid for the lease, or sue him on the implied covenant for quiet enjoyment.

CHAPTER IV.

RIGHTS AND LIABILITIES OF LANDLORD AND TENANT DURING TERM.

§ 46. **Tenant estopped to deny lessor's title.** It would be manifestly inequitable to permit one, who has obtained possession of premises by admitting the title of another, to exclude that other from the possession or enjoyment of the advantages of ownership of the premises by mere reason of the inability of the lessor to prove his title. It is therefore a well established principle of the law of landlord and tenant, that, whatever the nature of the lease, written or oral, long or short, though the lessor be a slave, though the lessee be a public corporation, whatever the character of the parties, the tenant will not be permitted, while he retains the possession acquired under a lease, to deny the title of the lessor. Since the estoppel arises from the fraud that would result from the lessee being allowed to deny the lessor's title while retaining possession, the effect of the estoppel may be avoided at any time by the tenant surrendering the possession to the lessor. After that is done the tenant may assert whatever title he has and recover the land of the lessor if he can. The reason for the rule also shows that the estoppel cannot be avoided by showing defects in the lease, nor by proof of the lessor's admission that he has no title, nor that the property in question taken under

the lease was not described nor included in the description in the lease, nor that the lease shows on its face that the lessor has no title. The estoppel extends to the lessee and all claiming under him, to all parts of the demised premises, to all sorts of property. If the lease was taken from an agent who did not disclose his principal, the tenant is estopped to deny the title of the principal or the authority of the agent. On the other hand, if the person against whom the estoppel is alleged was in possession before the alleged lease was made, the fact of the execution of the paper, or even the payment of rent under it by the tenant, or distress levied is not conclusive evidence that he holds under the lease. As to the effect of such a transaction in creating an estoppel the courts are not agreed. The acceptance of a lease and obtaining possession under it do not estop the lessee from claiming that he has subsequently obtained his lessor's title.

§ 47. **Liability for taxes, insurance, etc.** Acceptance of a lease for years imposes no liability on the lessee to pay taxes, or his lessor's rent to a superior, or to maintain insurance, or to pay mortgages, or other charges on the premises; and if he is compelled to pay any of these to save his term, he can recover the amount paid in an action against the landlord for money paid to his use, or he may set it off against his liability for rent. But the relation of a tenant for life to the reversioner or remainder-man is very different; he is bound to keep down all assessments and charges on the property during his term. A tenant for years is also bound to pay to his landlord whatever the landlord has been compelled to

pay in taxes by reason of expensive buildings erected on the premises by the lessee without agreement as to taxes thereon, express or implied. A covenant by the lessee to pay all taxes assessed during the lease does not require him to pay void assessments nor special betterment taxes, and a covenant to pay all *assessments* has been held not to bind him to pay general state, county, and municipal taxes. The damages for the breach by the tenant of his covenant to pay taxes is the amount of the taxes paid by the landlord and interest. But the measure of damages for his breach of covenant to insure is generally held to be the amount lost by the lessor by reason of the breach, which might be the extent of the damage to be insured against, not exceeding the amount of insurance agreed to be taken, nor the amount of the damage done.

§ 48. **Waste and liability therefor.** Waste is the destruction or spoiling of houses, lands, or tenements to the disherison of him in remainder or reversion, and is of two kinds, voluntary and permissive. Voluntary waste is the doing of any act of positive destruction, such as cutting down trees, pulling down houses, or the like; permissive waste is neglecting to do what ought to be done to prevent their destruction, as by failing to patch the roof, whereby the leak causes the interior of the house to be injured by the rain. By the law of England it was considered waste for a tenant to convert meadow into plow-land or the reverse, but that would not be considered waste in this country generally. Any material alterations in the internal arrangement of buildings on the

premises would, however, be waste, regardless of the relative value of the old and new plan, unless the landlord assented to it, for he has a right to be whimsical. The tenant of a farm has the right to take from the premises whatever of fuel he can find in the woods on the land for his house to the extent that the burning of such fuel is customary in the community, provided he does not cut down any timber trees, shade trees, ornamental trees, productive orchards or the like. He can only take the refuse for fuel, or such as would not be of peculiar value to the land beyond its value for fuel. He has also the right to take a reasonable amount of timber trees, according to the custom of the country where the land is, for the repairing of the houses of the lessor on the premises. But to cut timber to sell or for new buildings would be waste in the absence of local justification. The injury or destruction of timber, fruit, or ornamental trees, or of shrubs or plants of value to the land, is waste, for which the tenant is liable in damages as well as for the forfeiture of his term. It is waste for the tenant to open new mines on the premises in the absence of permission in his lease to do so; but he may work opened mines, and for this purpose may drift on the vein and open new shafts for ventilation and to hoist the ore. The remedies for waste are injunction to prevent it, damages for it, and the forfeiture of the term.

§ 49. **Dangerous premises: Liability to third parties.** At common law the liability of the occupant of land for injuries to others upon the land due to the condition of the premises depends upon the relation of the injured

person to the occupant, whether trespasser, licensee, or invited person, and upon whether the occupant actually knew of the danger or could have discovered it by reasonable inspection. See Chapter VI, Section 7, of the article on Torts in Volume II of this work. For a nuisance, injurious to persons off the land, the occupant of the offending premises is liable. A land owner cannot escape liability for injuries by a nuisance on his land by leasing it, and if the tenant continues the nuisance, any third person injured thereby may sue and recover for his injuries of either the tenant or the landlord, regardless of whom the lease bound to make repairs, or he may sue the landlord and tenant jointly. Similarly both parties are liable if the lease contemplates such a use of the premises as will be a nuisance.

It is commonly said that the landlord is also liable to strangers for nuisances which he has agreed with the tenant to guard against, although the premises are in possession of the tenant (1).

But if the lessor is under no duty to repair and has given the entire control to the tenant, he is not liable to any third person for any injury received from a dangerous condition created by the tenant or arising during the term unless the lessor has helped to occasion the injury by volunteering to repair and doing it so negligently that the damage resulted (2). The same has been held though

(1) Ahern v. Steele, 115 N. Y. 203 (collecting cases). Contra: Clyne v. Helmes, 61 N. J. L. 358.

(2) Barman v. Spencer (1898, Ind.), 49 N. E. 9; Munroe v. Carlisle, 176 Mass. 199.

he had the right to repair or terminate the lease (3).

§ 50. **Same: Liability of lessor to tenant.** In the absence of statute, contract to repair, or warranty of condition, both the landlord and tenant must use reasonable care and diligence to avoid exposing others to or being themselves injured by, a dangerous condition known to them; and if through their negligence in this respect injury results to themselves or others they must bear the loss or make satisfaction for it. "If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or, knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually knew they were unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being without fault. It is not upon the ground of an insurer or warranter of condition under his lease or contract, but on the ground of the obligation implied by law not to expose the tenant or the public to dangers which he knows or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence. The cases are numerous which use the expressions laid down in the opinion in this case, that the landlord is liable, not only for actual knowledge, but also for reasonable care and diligence in obtaining such knowledge—not only when he knows, but when he ought to know, of the defects, by using ordinary care and diligence." The above quo-

(3) Timlin v. Standard Oil Co., 126 N. Y. 514.

tation is from a case in which a lessor was sued by his lessee and her boarders for personal injuries each received from the collapse of the porch to the house due to defective construction and decayed condition not so obviously dangerous as to deter an ordinarily careful person from using it (4).

§ 51. **Same: Lessor's promise to remedy.** In another case the court held the lessor liable to the tenant in damages for the death of the tenant's child by drowning in a cistern known to the tenant to be unprotected when he went into possession, wherefore he was charged with contributory negligence and also was charged to have assumed the risk, though the lessor had promised when the lease was made to fix it. The court said: "If it can be said that the master, by specially agreeing to remedy a certain defect, assumes to be responsible for any injury caused thereby, until he can have a reasonable time to repair, it can with like reason be said that the landlord who undertakes and promises to remedy or repair a certain known and specific danger existing on the rented premises at the time and before they are rented, assumes the responsibility for any injury caused by such dangerous place, until he have a reasonable time in which to repair, providing, of course, that care is exercised to avoid falling into the dangerous place, or to avoid injury from the known defect" (5).

A contrary view is expressed in Perez v. Raybaud (6),

(4) Hines v. Wilcox, 96 Tenn. 148.
(5) Stillwell v. South L. L. Co. (Ky.), 52 L. R. A. 325.
(6) 76 Tex. 191.

holding the landlord not liable to action by the servant of the tenant for injuries from the falling of a cistern after the lessor had been informed that the supports were decayed and had promised to repair. It was held that the promise was void for want of consideration and the tenant's servant was not a third person.

§52. **Same: Lessor's concealment of knowledge.** In another case the lessee complained to the lessor about the well water, and the lessor, on examination, found a putrid dog in the well, of which he did not inform the lessee, but said the water would do to scrub with, though not fit to drink. He left the dog in the well, the tenant and his family continued to use it, and several of them became sick. In an action for the rent, judgment was given for the defendant for the amount of his damages and expense from use of the polluted water (7).

The rule perhaps is that the lessor is under no obligation to inspect the premises continually after the lessee takes possession, in order to guard him against dangers arising or that might be discovered after the lease is made; but if he actually discovers or suspects dangers after the lessee goes into possession, and fails to warn the lessee of the danger, he is liable in damages for whatever injury results (8). This is not by virtue of any provision in the lease or warranty of safety, but because any concealed danger in premises is a nuisance for the results of which the owner is liable if he is in fault. But not all courts hold even this. In Massachusetts the dis-

(7) Maywood v. Logan, 78 Mich. 135.

(8) Gallagher v. Button, 73 Conn. 172.

covery by the lessor during the term that a drain from the house was leaky which he was under no obligation to repair, and of which he did not inform the tenant, was held not to render the lessor liable in damages to the tenant, though it was alleged that the death of a member of the tenant's family from typhoid fever resulted from this leak in the drain, in that the deceased was infected thereby (9).

§ 53. **Same: In control of lessor.** The lessor is not excused from liability to his tenants for injuries resulting from dangerous conditions maintained on his own premises even by binding the tenants to keep their premises in repair, as where a tenant in covenant to keep his rooms in repair was injured by the explosion of the heating apparatus in the possession of the landlord in his basement (10). The same is true of parts of the premises used in common by tenants of property (passageways, stairs, etc.) but controlled by lessor. See § 55, below.

§ 54. **Lessor's liability for repairs and improvements.** In the absence of statute or promise in the lease the landlord is not bound to make repairs or improvements, or to make good loss or injury suffered from want of them. In an action by a tenant against a landlord for damages to his goods, from failure of the landlord to make repairs promised after the lease was made in order to induce the tenant not to leave the building, the court said: "In the lease of a store or warehouse, there is no implied warranty that the building is safe, well built, or fit for any

(9) Bertie v. Flagg, 161 Mass. 504.

(10) Ralton v. Taylor, 20 R. I. 279.

particular use. So, in a lease of a house there is none that it is reasonably fit for habitation. . . . Nor is it implied that it shall continue fit for the purpose for which it is demised, as the tenant can neither maintain an action, nor is he exonerated from the payment of rent if the house is blown down or destroyed by fire, or the occupation rendered impracticable by the act of God or the king's enemies. When it is agreed that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. . . . In the absence of any special agreement, the tenant takes the risk as to the future condition of the premises leased. The tenant takes the premises for better and for worse, and cannot involve the landlord in expense for repairs without his consent. . . . It is not in proof that the premises were out of repair when the tenant entered upon their occupation. The landlord, being under no obligation to make repairs, promised the tenant who was under such obligation to make them. The promise was without consideration. It was no part of the original agreement. It was made while the tenant was occupying the premises. The action cannot be maintained'' (11).

§ 55. **Same: Appurtenances under lessor's control.** To the rule that the landlord is under no obligation to repair there is an exception in the case of appurtenances not in the exclusive possession of the tenant. For example: ''The plaintiff was a tenant of the defendants,

(11) Libbey v. Talford, 48 Me. 316. But see Ehinger v. Bahl, 208 Pa. St. 199, holding lessor liable for injury to goods from fall of house after notice and promise to repair, the lease being from month to month.

occupying an apartment in a building owned by them in Jersey City. There were several apartments in the building, and these were separately rented out by defendants to different families. The halls and stairways of the building were used in common by several tenants. While descending one of these stairways the plaintiff stumbled and fell, sustaining personal injuries. This action was brought to recover compensation therefor from the landlords, upon the ground that the plaintiff's fall was due to the bad condition of the stair covering. . . . In this state it is established as a general rule that the landlord is not liable for injuries sustained by a tenant or his family or guests by reason of the ruinous condition of the premises demised, there being upon the letting of the house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways, and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the premises demised. With respect to such ways, it has been held by our supreme court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them.

This doctrine, we think, is undoubtedly sound. It is in nowise opposed to the rule which exempts the landlord from liability for the condition of the premises demised, but is plainly distinguishable therefrom'' (12).

Where the landlord has given over the whole premises, part to one tenant and part to another, the rule laid down in the above case does not apply; and he is not liable to any of the tenants for any defect in any part of the premises not amounting to a nuisance, in the absence of contract concerning it with the complaining party (13).

§ 56. **Same: Statutory liability.** In California a statute was enacted, which has been substantially copied in Montana, Oklahoma, North Dakota, South Dakota, and probably other western states, providing that a lessor of buildings intended for the occupation of human beings must, in the absence of agreement to the contrary, put them in condition fit for occupation and repair all subsequent dilapidations not due to the tenant's negligence; and if he fails to do so within a reasonable time after notice the tenant may repair and deduct the same from the next month's rent or vacate and be discharged from further rent. It has been held that these statutes are not applicable to any buildings other than residences, and that the landlord cannot be charged with repairs made without demand and notice to him, nor will abandonment for want of repairs excuse the tenant from the payment of rent unless he has given notice to the landlord and a

(12) Siggins v. McGill, 72 N. J. L. 263.

(13) Kearines v. Gullen, 183 Mass. 298.

reasonable opportunity to repair (14). Under a somewhat similar statute in Georgia it was held that damage to goods, which might have been prevented by reasonable diligence by the tenant, could not be deducted from the rent in an action on a distress warrant, though resulting from the landlord's failure to repair (15).

§ 57. **Lessor's right to enter to make repairs.** In the absence of covenant to repair or right reserved in the lease to the landlord to make them, he has no right to enter on the demised premises during the term to make repairs without the previous consent of the tenant to his doing so, and the tenant may sue him for the trespass and avail himself of the benefits of the repairs without paying any extra compensation; and even a covenant to repair or a right reserved to enter to make repairs would not excuse the landlord from an action for trespass for entering and making extensive betterments or alterations further than were necessary to keep them in the condition in which they were at the time the lease was made. A covenant to repair, or a statute imposing that duty on the landlord excuses him from liability as a trespasser in making entry for that purpose; but the fact that the premises are in an unsafe condition, for which the landlord would not become liable, would be no excuse for entry; and even the order of the public building inspector to make it safe or tear it down would not justify any further interference with the possession of the tenant

(14) Tucker v. Bennett, 15 Okla. 187.

(15) Aiken v. Perry, 119 Ga. 263.

than is absolutely necessary to comply with the order (16).

§ 58. **Agreements to repair: Construction and effect.** A covenant to put in repair can be broken but once, and is available only to the lessee; but a covenant by the landlord to keep in repair runs with the land and reversion, and may be sued on by the assignee of the lessee against the lessor's grantee. A clause excusing the lessee from duty to make certain or all repairs does not by implication impose any obligation on the landlord to make such repairs. Nor will a covenant to repair be implied from the reservation of the right to enter to make repairs, nor from the fact that the lessor has gratuitously made some repairs, nor from his covenant to pay for repairs the tenant may make. A covenant to build on the premises before the tenant takes possession, or to put the premises in a state of repair before the term is to begin, imposes no duty on the lessor to keep the premises in repair after that during the term. A covenant to build does not impose a duty to rebuild if the house is destroyed by fire after the tenant takes possession; but a covenant of the landlord to keep the premises in repair requires him to rebuild them if destroyed during the term without the fault of the lessee. The sort of repairs that a covenant requires depends on the nature of the premises and the condition in which the tenant is to accept them at the beginning of the lease. If the lessor keeps the premises in as good condition as they were at that time the covenant is satisfied. He is not bound to make general

(16) Kansas Inv. Co. v. Carter, 160 Mass. 421.

or extensive improvements under such a covenant, nor to make repairs caused by the negligence of the tenant, nor does such a covenant excuse the tenant from liability for such injuries. The absence of duty of the landlord to make repairs does not excuse him from liability to the tenant in tort for injuries done him by the negligent manner in which the repairs are made by the lessor.

§ 59. **Tenant's remedies for breach of lessor's contract to repair: In general.** If the lessor fails to put the premises in repair before being occupied and has agreed to do so, the lessee may refuse to occupy and defend any action for rent, or he may sue for damages for breach of the covenant whether he does or does not go into possession. Or he may make the promised repairs himself and sue and recover the cost of the lessor, or deduct it from the rent, or set it off against the lessor's demand in a suit for the rent. If the failure to make the promised repairs caused the premises to become untenantable, or if they were untenantable and the lessee took possession in the expectation that the lessor would immediately make the repairs, in which the lessor disappoints him, the tenant may abandon the lease and refuse to pay rent for longer than the time he occupied. But the covenant to pay rent and the covenant to make repairs are independent; failure to make the promised repairs does not excuse the tenant from his liability to pay the agreed rent for the time he was in possession, less the damages claimed and proved by him resulting from the breach of the covenant of the lessor to repair; and on the other hand he may sue for breach of the covenant to repair without hav-

ing paid his rent. For the same reason he cannot abandon the lease and avoid liability for the rent merely by reason of the breach by the landlord of his covenant to repair unless the want of repairs renders the premises untenantable (17).

In order to charge the lessor for the cost of repairs he promised to make, and which the tenant has made and paid for, the tenant must show that he notified the lessor of the need of the repairs and gave him opportunity and time to make them before undertaking the task himself; for otherwise the lessor is not put in fault, as he has the privilege of making the repairs himself if he desires to do so.

§ 60. **Same: Form of action.** In case of suit for damages for failure to make the repairs it is important to observe the form of the action, as that may affect the measure of damages recoverable. In an action in tort the plaintiff may recover the damages he has suffered from the intentional or negligent wrongs done him by the defendant regardless of contract; but in an action on contract for breach of the covenants of the lease the plaintiff can recover only the damages he has suffered from the breach of the contract. In an action in tort for injuries the plaintiff suffered from falling through a barn floor, which the defendant as his lessor had promised to repair, the court said:

"If a lessee is injured by reason of the unsafe condition of the premises hired, he cannot maintain an action

(17) Piper v. Fletcher, 115 Iowa 263 (holding an untenantable condition and abandonment therefor a good defense to an action for rent).

against the lessor in the absence of warranty or misrepresentation. In cases where lessors have been held liable for such injuries to the lessees, the liability is founded in negligence. The plaintiff admits the general rule, but claims that this case is taken out of it, because, at the time of the letting, the defendant agreed to repair and put in safe condition the stable floor, the unsafe condition of which caused his injury. . . . The question is whether, for such a breach [of contract], the plaintiff can maintain an action of tort to recover for personal injuries sustained by reason of the defective condition of the stable floor. The cases are numerous and confusing as to the dividing line between actions of contract and of tort; and there are many cases where a man may have his election to bring either action. When the cause of action arises merely from a breach of promise the action is contract. The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. . . . In the case at bar the utmost shown against the defendant is that there was unreasonable delay in its part in performing an executory contract." And so no cause of action (18).

§ 61. **Same: Where covenants of lessor and tenant are independent.** In an action to enjoin prosecution of summary proceedings to oust complainant and for damages for breach of certain covenants, including the payment of rent, the complainant alleged that the defendant had not made the repairs he covenanted to make. The court said: "The plaintiff having entered upon the demised

(18) Tuttle v. Gilbert Mfg. Co., 145 Mass. 169.

premises under the lease, and continued in possession, was bound to pay the rent reserved, and it could not defend on the ground that the covenant on the part of the lessor to put the premises in repair, or to make changes and alterations required by municipal or other legal authority, had not been performed. On the other hand, the lessor, when sued on its covenants, could not allege in bar of the action, that the lessee had remained in possession of the premises, but either one, in an action brought against him by the other, could counterclaim any demand arising under the lease against the plaintiff in the action. The tenant in a suit for the rent, could recoup any damages for a breach of the covenants to repair; and the landlord, if sued by the tenant for a breach of the covenants on its part, could counterclaim the rent reserved in the lease. . . . The lessee is not bound to give up its lease to avail itself of the landlord's covenants, and a rule that remaining in possession would constitute a bar to his action would defeat one of the very purposes of the rule that covenants of this character are separate and independent" (19).

§ 62. **Same: Measure of damages.** "Where a contract is made in view of an already existing contract with a third person, and the contract sued on is made with special reference to such contract, and to enable the party to carry it out, then the loss sustained or the profits which might have been realized, on such contract with a third person, may be proper subjects for consideration.

(19) Thomson-Houston Elec. Co. v. Durant Land Co., 144 N. Y. 34.

But in the ordinary case of a lease of a building for any purpose at the discretion of the lessee, if there has been a breach by the lessor of a covenant to repair, the rule which measures the damages by the difference in general rental value is usually compensatory, and in most cases best satisfies the demands of justice. . . . The claim that the cost of repairing the walls is the measure of damages cannot be sustained. If the tenant had elected to repair the walls it is possible that he could have charged the necessary expense to the landlord, or recouped the amount in an action for the rent. But a tenant is not bound to make permanent and important repairs, which the landlord was to make, but may seek his remedy by action to recover the damages or by counterclaim'' (20). In another case the defendant covenanted in a lease of a store-room to plaintiff that he would put a new roof on it by such a time, provided that he should not be liable for any damage to plaintiff's goods by rain or snow before that time; and it was held that the defendant was not liable for the damages from the weather after the date referred to by reason of his refusal to perform his covenant. The court said that the plaintiff was bound to protect his goods from a known danger or bear the loss (21).

§ 63. **Liability of landlord for repairs and improvements made by tenant: In general.** In the absence of contract or statute, the law imposes no obligation on the

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(20) Thomson-Houston Electric Co. v. Durant Land Co., 144 N. Y. 34.

(21) Hendry v. Squier, 126 Ind. 19.

landlord to pay the tenant for repairs or betterments made by him, and the tenant cannot even set them off against his liability to pay rent. "The tenant is presumed to repair and improve for his own benefit; and his right to the result of his labor expended for that purpose is to reap the enhanced benefit during the term, and, within certain limitations, to remove the improvements before its expiration. It is only by virtue of an express agreement by the landlord to pay for improvements that the tenant can recover their value of him. But a special promise may be implied from conduct; and, if the landlord leads the tenant to believe that the value of the improvements he may thereafter put upon the premises will be deducted from the rent or paid to him, a contract to do so may be implied; and a promise to pay, thus imputed to the landlord, is a counterclaim in an action for the rent. But the mere fact that the landlord permits the tenant to make permanent improvements without protest or warning that he will not pay, raises no presumption that he intends to do so" (22). If no rule has been provided by the lease as to how the value of the improvements is to be ascertained, a court will estimate them by their present value to the land, though much less than their original cost to the lessee.

§ 64. **Same: Lessor's assigns.** A stipulation in the lease that the landlord shall pay for improvements put on the premises by the lessee during the term or renew the lease entitles the landlord to terminate the lease at

(22) Gocio v. Day, 51 Ark. 46.

the end of the term by paying for the improvements, or at his option to escape liability for the improvements by tendering a new lease; but he must make his election by the end of the lease or he loses his right to choose, and if he has put it out of his power to renew by selling the land in the mean time, he must pay and is in no way relieved from his covenant by disposing of the property. On the other hand it is a covenant running with the land and the reversion though assigns are not mentioned; and unless the tenant has agreed to surrender possession before being paid, he may retain possession until he is paid for his improvements, with liability for ground rent after the expiration of his term, and in the mean time he may prosecute suits for the money against the lessor and the grantee of the reversion. The fact that the lessee is in possession of the land charges all purchasers with notice of his rights if they do not take the pains to inquire of him, and they cannot escape liability either on the ground that they were not party to the contract or did not know of it, as it runs with the reversion. The assignee of the tenant may claim all the rights of the tenant and sue the lessor of his grantee (23). If the lease provides that the lessee shall not sublet or assign without the lessor's assent, an assignment without his consent would confer no such rights on the assignee; and the right of the lessee may in many cases be lost, as by

(23) Ecke v. Fetzer, 65 Wis. 55; Franklin Land M. & W. Co. v. Card, 84 Me. 528. In the older cases and in some states today it is held that covenants to pay for improvements to be made do not inure to the benefit of the assignee of the term if assigns are not mentioned in the lease. Etowah Min. Co. v. Wills Val. Min. Co., 121 Ala. 672.

the surrender, abandonment, or forfeiture of his term. If a tenant makes improvements under such a covenant in his lease and then is ousted by a paramount title, he may claim compensation for permanent improvements, as a bona fide occupant.

§ 65. **Liability of tenant to make repairs and improvements: In absence of contract.** In the absence of any contract the tenant is bound to repair or make good all injuries to the premises due to his negligence or wrong, and to make such slight incidental repairs as are necessary to keep the buildings wind and water proof; but he is not bound to make substantial repairs nor make good the natural deterioration from ordinary wear and tear, or replace old materials with new. For injuries to the premises from reasonable use according to the lease, or for destruction from accident without negligence on his part he is not liable. But if he uses the premises for a purpose in violation of his contract he does so at his peril. Subtenants are under the same liability. A lessor was permitted to recover against a sublessee for the destruction of a warehouse resulting from the storing of cotton in it, a risk not contemplated by the lease; and it was held to be no defense that the lessor had already recovered the amount of his loss from a fire insurance company, which was a matter wholly between the owner and the insurance company for which the insurers had been fully paid by the premiums (24). Of course the burden of proving the negligence of the tenant and that it produced the loss is on the party seeking to recover

(24) Anderson v. Miller, 96 Tenn. 35.

because of it. At common law the tenant had the right to take from the premises the timber necessary to make repairs (§ 48, above).

§ 66. **Same: Under contract.** When the tenant has covenanted to make repairs he is bound to do so. If the covenant is general he must make the repairs regardless of the cause of the damage, unless it be the fault of the lessor himself. If there is a total destruction of the premises from inevitable accident this general covenant requires the tenant to rebuild, except where there are statutes, as there are in a few states, that such covenants shall be given a narrower construction unless the intention of the parties is clearly expressed that the tenant shall be bound to rebuild. An agreement of the tenant to repair or build requires him to furnish and pay for the materials with which to make the repairs, except in so far as his right to estovers enables him to take the materials from the demised premises (§ 48, above). In this case also the fact that the landlord's loss has been made good by insurance is no defense to the lessee for breach of this covenant. "In the present case, although the defendant had, under his hand and seal, stipulated that he would keep in repair, support, and maintain the fences and buildings, with the exception of natural decay, he was undoubtedly astonished at being called upon to rebuild a house, the use of which he had enjoyed but for a year; and yet he has, in express terms, covenanted so to do. His excuse would be that he never read the covenants in his lease, or that he did not understand the force and effect of the terms. But the law does not protect

men from their own carelessness or ignorance. The former they must cure; the latter they must provide against by asking counsel'' (25).

A general covenant to repair, or to keep the premises in repair merely requires him to keep the premises in the condition in which they are at the time of the lease, and he is not bound to put them into tenantable condition, nor make repairs or changes that may be required by the public authorities, unless the lease provides that he shall put them into tenantable condition and make such repairs or alterations as the public authorities may require. A covenant to *keep* in repair requires that the repairs be made as needed to avoid injury and deterioration of the property. But a covenant to make repairs or improvements, or to put the premises into a tenantable condition, without specifying the time within which the repairs or improvements shall be made, gives the tenant the whole term in which to make such repairs or improvements, and he is not liable to suit or forfeiture during that time for his failure to do so (26).

§ 67. **Same: Tenant's assigns.** Covenants by the tenant to make repairs and improvements run with the lease and the reversion, binding him and his assigns to the lessor and his heirs and grantees. The lessee does not diminish his liability by assigning his lease, for his liability is founded on his contract. But as the assignee of the lessee is under no contract liability, and is liable only

(25) Phillips v. Stevens, 16 Mass. 238.

(26) Chipman v. Emeric, 5 Cal. 49. But see Wilson v. Owens (1897, Ind. Ter.), 38 S. W. 976.

by reason of the privity of estate between him and the lessor or his grantee, he is liable only for breaches of the covenant during the time he has the property; by making another assignment he may escape any further liability for breaches after the time he assigns, but not for the time he had the property (27).

(27) Bullock v. Dommitt, 6 Term 650; Pitcher v. Tovey, 1 Salk. 81.

CHAPTER V.

RENTS.

§ 68. **Nature of rents.** Rent is a render or return in the nature of an acknowledgement or compensation for the possession and use of lands, tenements, or hereditaments. There is no necessity for it to be in money, as it usually is. Provisions, cattle, services, or other things given for the use of land are equally rent. It may also consist partly in services, partly in provisions, and partly in money (1). It ought to be certain, but it is not necessary that it issue every week, month, or year. It was usually in the old law yearly, as the farmer had the crops yearly with which to make the payment. But it might be every other year or at other periods. To be rent it must issue out of and be for lands and tenements corporeal; otherwise it is a mere personal debt or annuity, not at common law assignable, and binding only on the parties by virtue of their contract.

§ 69. **Kinds of rents.** At common law there were three kinds of rents, viz: service, charge, and seck. Rent service could exist only between lord and vassal as an incident of tenure, and its most valuable and distinctive incident was the right of the lord to seize and hold the goods of the tenant in distress for the breach by the tenant of his covenant to pay rent, or the like, though nothing was said in the instrument creating the rent con-

(1) Fiske v. Brayman, 21 R. I. 195 (payable in ice).

cerning the right to distrain. Rent charge was rent without any tenure between the lord and tenant, but containing an express provision giving the lessor the right to take the goods of the lessee and his assigns for distress to compel payment of the rent. Rent seck, also called barren rent because of the lack of remedy for enforcement of it, was rent without any right to take distress, either by virtue of tenure or express stipulation in the lease. All of these also had other names, as white rent if payable in money (silver), black rent (blackmail) if payable in provisions, chief rents if payable to the king by freeholders, rack-rent if for all the use was worth, and fee-farm rent if reserved in a conveyance in fee. The classification of rents as service, charge, or seck is now principally of historical interest, as there are no tenures, and distress now exists by virtue of statute or provision in the lease if at all. In a number of the states the practice of taking distresses is now out of use. Royalties reserved in mining leases of every tenth bucket of ore or so much for each ton hoisted or sold are within the strict definition of rent. All true rents are strictly reservations, which may be defined to be a taking back or creating something new to the grantor to issue out of the land granted; and it was a rule of the old law that all reservations to a stranger to the deed were void. Therefore, if land is let and the lessee is required to make payments to one not a party to the deed, these required payments are not strictly rent, though they may be recoverable by the party for whose benefit the payments are to be made.

§ 70. **Liability to pay rent: In general.** The giving of the lease is a sufficient consideration for the promise of the lessee to pay rent; and it is no defense to the action for rent that he never took possession under the lease, unless his failure to take possession was due to the failure of the landlord to enable him to enter, or the lessor's failure to put the premises in the condition in which they were to be before the tenant was to take possession, or unless the lease was void. On the other hand, there is no liability for rent unless there is a lease or an agreement express or implied to pay rent. As a general rule one who occupies the land of another with his permission is liable under an implied promise to pay what the occupation is worth; but the relations between the parties, as brother and sister, parent and child, or the like, may rebut this presumption; and if it appears that the intention of the parties was not to pay rent, as if possession is taken as vendee, as the agent of the owner, or the like, no such promise is implied. If one enters under a void lease, because it is not in writing, or the like, he is still bound to pay rent, and the lease may be proved to show the amount the plaintiff is entitled to recover.

Actual possession is essential to render one liable for use and occupation in an implied assumpsit, and in most cases of liability for rent created by implication. The amount of rent recoverable on these implied contracts to pay is the rental value of the premises, regardless of their peculiar value to the tenant, his failure to make the best use of them, that they would have been vacant but for his possession, or the like; and what is

their rental value is a question of fact for the jury. But the implied liability for holding over the term is the former rent.

§ 71. **Same: Assignees, agents, partners, mortgagees, etc.** An assignment of a lease creates a liability by the assignee to pay the rent, but does not release the lessee from liability unless it amounts to a surrender of his term or the equivalent of an express discharge of him, though the lessor accept rent of the assignee. If rent is payable quarterly, assignment during the quarter makes the assignee liable for the whole quarter's rent. An agent does not become personally liable for the rent by occupying for his principal. Neither the firm nor the other members of it become liable for the rent on a lease to one of its members by occupying the premises for firm purposes. A subtenant is not personally liable for the rent on the original lease. A mortgagee or sheriff does not become liable for the rent by taking possession of the lessee's goods on the premises and proceeding to sell them there. But if the tenant for years or his assignee die, the executor or administrator is liable to the same extent his decedent would have been for all the rent if the deceased was the lessee, or for the time possession was had from taking till making the assignment if the decedent was assignee. In all these cases, the mortgagee, sheriff, partnership, etc., may become liable by promising the lessor to pay the rent to induce him not to forfeit the lease for default.

§ 72. **Same: Trespassers.** If one enters as a trespasser and holds the land of another adversely

the law will imply no promise to pay rent. In such case the action must be in tort for the mesne profits, not for rent. If one in possession of the land of another is informed by the other that a certain rent will be demanded for further occupation, acquiescence and agreement to pay the demanded rent will be implied from the continued possession of the occupant without denial that he holds as tenant and under liability for rent. If the occupant originally entered as a trespasser the law will presume that his occupation continued as such; and the burden is on the owner to show subsequent recognition of his title in order to enable him to maintain assumpsit for use and occupation; but in the absence of proof that the entry was wrongful, the law would not presume a wrong, and so proof of ownership by plaintiff and occupation by defendant without further explanation would make a prima facie case.

§ 73. **Who is entitled to rent? In general.** Rent past due is a chose in action not affected by any release, surrender, assignment, merger, or other disposition of the reversion after the rent became in default; he is entitled to it who would have been entitled to it if none of these acts had been done. Rent not yet past due is incident to the reversion to which it is due. A transfer of the reversion to which the rent is to accrue gives the transferee the right to the rent when it accrues unless there is a stipulation to the contrary in the conveyance. But the rent and the reversion may be separated. The owner of the lease and reversion may sell the lease and rent without the reversion, the rent without the lease or reversion,

the reversion without the rent or lease, or the like, by appropriate conveyances. He may also keep the reversion and sell part of the rent to one and part to another, or he may sell part of the reversion to one, part to another, and keep part himself.

§ 74. **Same: Apportionment of rent.** "Rent, whether rent service or rent charge, may be divided in amount, and assigned in several parts, by deed or will, whilst the reversion and the tenement charged remain entire; and the assignee of a part of the rent may distrain for the amount of his part separately. The attornment or consent of the tenant of the land to such partition of the rent is not necessary; for though he may thereby be subjected to several actions or distresses, it would be only by reason of his own default in not paying the rent. Rent service is apportioned by law upon a partition of the reversion to which the rent is incident. If the partition is made in undivided shares, the rent is apportioned in amount according to the number of the shares; and each partitioner may distrain in his own right upon all of the demised premises, but only for the amount of his own share. If the partition is made by granting the reversion of several parts of the demised premises separately, the rent is apportioned according to the value of the several parts; and each reversioner may distrain upon his own part only for the rent apportioned to that part. In such case the tenant is not bound by an apportionment without his consent, and if he disputes the amount claimed, it must be settled in the legal proceedings taken by the several reversioners for their respective shares of the rent. . . .

The lessor who grants away the reversion in part of the demised premises remains entitled to the value apportioned to the reversion of the part retained; and he may recover that amount upon the covenant by the lessee to pay the rent reserved. And the grantee of the reversion in part may also recover upon the covenant the amount of rent apportioned to his part" (2).

§ 75. **Same: Transfer of reversion.** But if the lessor for years gives a new lease for years for a longer term than the first is to continue, and the new lease is to begin at once, this grant of the whole reversion for the period covered by the old lease and more passes the whole rent to the new lessee, who is entitled to recover it, and not the lessor. The first lessee may set up in defense of an action against him by the lessor that the reversion has been thus assigned, though no claim has been made of him for the rent, but if he pays the rent to his lessor before notice of the assignment, such payment will be a good defense to an action against him by the assignee or grantee of the reversion. If the tenant buys the reversion the rent now due to himself is extinguished, and if he buys part of the reversion the rent is extinguished to the proportion of the reversion purchased. If the lessor dies the rent belongs to him to whom the reversion goes, to the executor or administrator if the lessor had only a term for years out of which he made the lease, to the heir if the lease was out of a descendable estate, to the devisee if the testator devised the reversion. If the lessor assigns the rent or lease or a part interest therein, a subsequent

(2) Leake's Uses and Profits of Land, 412-3.

grant of the reversion gives the grantee no right to the part of the rent previously assigned; but if the lessor merely grants the reversion "subject to the lease" the grantee is entitled to the rent. A grant on the day the rent is due carries the rent to the grantee.

§ 76. **Same: Apportionment as to time.** At common law there was no apportionment as to time, and the rule still holds in the absence of a statute governing the case. If the lessor or landlord conveys the premises before the rent is due, he cannot recover any part of the rent due at the next payment; and this is so though there has been no attornment to the grantee or eviction by him. If the life tenant dies during a quarter or even on the last day of it, the rent due and payable by his tenant at the end of the quarter all goes to the remainder-man or reversioner—at least it is not recoverable by the executor of the life tenant. At common law the lessee might escape payment entirely. The remainder-man had no rights under a lease made by the life tenant, and by the termination of the life estate before the rent day the lessee might abandon possession and escape all liability; but by statute, 11 Geo. II (1737), c. 19, § 15, the executor was authorized to recover a proportionate amount. Even to this day, if the lessor terminates the lease by a wrongful eviction between rent days, the lessee may abandon and defend against any action for the rent accruing since the last rent day. Likewise if the lessor evicts him from a substantial part of the premises and because of it he abandons the whole. If the lessor owning the fee leases for years and dies during a quarter, the heir is entitled

to the whole rent and the executor or administrator to none. If the lessor dies on the day the rent is due, at any time before sunset, and the rent is not in fact paid, it belongs to the heir not to the executor, for the lessee has the whole day to pay it; or if the lessor grants the reversion on the day the rent is due the grantee has the rent, for the same reason (3). A release by the lessor to the lessee of all causes of action to date does not release rent yet to become due. By the terms of the lease it may be provided that the rent shall be due from day to day, and thus obtain apportionment; and such is the effect of statutes existing in several of the states.

§ 77. **When rent is due.** An agreement to pay rent in advance is valid and enforcible; but in the absence of provision in the lease or usage proved, the rent is not due till the end of the term of the lease. If the rent is reserved in a lease for years at so much per year, quarter, month, or the like, it is due and payable at the end of each year, quarter, month, or other period named, in equal instalments. Rent payable in a share of the crop is due when the crop is harvested; if payable in ore, it is due as the ore is mined, and so of like cases; but it is believed that a lease of an ice-house with rent reserved payable in ice is demandable in the hot season, and payment cannot be made in ice harvest time. The tenant has the whole of the last day in which to make payment, and, if he is evicted on the day of payment at any time before default, he may abandon the premises and allege the eviction as a defense to any action for the rent. All options as to the time of

(3) Hammond v. Thompson, 168 Mass. 531.

payment are construed in favor of the tenant; a lease yielding a pair of gilt spurs at the feast of Easter or 20s by the next feast, does not put the lessee in default for non-payment till he has failed at the following feast to pay the 20s (4).

§ 78. **Effect upon rent of assignment, surrender, or failure to take possession.** Acceptance of the rent by the lessor from the lessee's assignee with knowledge of the assignment, is not a release of the lessee from liability, but a surrender of the lease by the lessee and a new grant by the lessor to the new tenant may be shown by parol; and after such acceptance of surrender by the lessor he cannot longer hold the lessee for more than the rent then due. Surrender without acceptance by the lessor is no defense. An assignee of a lease may end his liability without the consent of the lessor by merely assigning to another. Failure of the tenant to take possession at the agreed time does not suspend the running of the rent, unless his failure to take possession is due to the occupation of some other under the lessor or adversely; and then he has his election to take part and pay proportionate rent, or by notifying the lessor refuse to take any unless the entire contract is performed. It has been held that if the failure to get possession of part was due to refusal of the landlord to give possession the tenant need not even pay rent on the part he took.

§ 79. **Same: Ouster, eviction, and breach of covenant.** It is no defense to an action for the rent that the lessee has been wrongfully ousted and kept out by a trespasser,

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(4) Clune's Case, 10 Coke, 127.

unless the lessor covenanted to defend his possession against such persons. If the failure of the lessee to take possession was due to the prior possession of a tenant of the lessor under a prior lease holding over, and the tenant has compromised with him and agreed to accept rent from him, such person so holding over thus becomes the tenant of the lessee, and his later refusal to surrender is no defense to an action against the tenant for rent. Ouster by the king's enemies is a defense if the lessee thereupon surrenders to the lessor. Ouster by paramount title is a defense to an action for rent accruing after that time, as to the whole rent if ousted from the whole premises, as to a proportionate part of the rent if ousted of a part. On ouster from a part, the tenant may abandon the whole.

If the lessor enters for any other purpose than to demand rent, inspect for waste, make such repairs as the lease permits him to make, and so forth, and disturbs the tenant in his enjoyment of the premises, the tenant may abandon the lease and be released from all liability for rent afterwards to accrue or become due. Assertion of paramount title, or trespass by the landlord will not be a defense to an action for rent, if the lessee still remains in possession. If anything is done which entitles the lessee to consider himself evicted and he thereupon abandons, or if the lessor puts an end to the term for any cause, all liability for future rent ceases, but liability for rent past due remains. What constitutes an eviction is a question of fact for the jury, but so long as the lessee retains possession he cannot as a general rule claim that he is

evicted. It has generally been held that if the landlord actually ousts the tenant from a part of the leased premises unlawfully, he is thereby relieved of all liability for further rent for the rest of the term though he retains possession of the rest of the premises for the rest of the term. But liability notwithstanding entry may be continued by express words in the lease.

Defective, unsanitary, or untenantable condition of the premises is no defense to an action for rent unless the lessor covenanted for their good repair, or was guilty of fraud in inducing the tenant to take the lease by misrepresenting the character of the premises in this regard, or intentionally preventing the lessee from discovering it, and even then the tenant is liable if he retains the possession. Even for breach of covenant to repair, the tenant cannot quit and defend an action for the rent unless he has given the lessor notice and opportunity to repair.

§ 80. **Same: Destruction of premises.** In the absence of a covenant by the lessor to repair, the lessee is not excused from payment of any part of the rent by the destruction of the buildings on the premises by inevitable accident without fault of the lessee, if he has any right to use the land where they stood, or to put up any other building for any purpose. In an action for rent of rooms on a second story of a building that had been destroyed by fire, for rent accruing after the fire, the court held there was no cause for action, saying:

"At common law, where the interest of the lessee in a part of the demised premises was destroyed by the act

of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. It is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned, for, although the soil remains to the tenant, yet as the sea is open to everyone, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment to some extent of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reason the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term. Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood beneficially to some extent without the building, or he may rebuild the edifice; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building in such a case is analogous to the effect of the destruction of demised premises by the encroachments of the sea, and the established rule for the abatement or

apportionment of the rent should be applied in the former as well as in the latter case'' (5).

A provision in the lease that the lessee shall not be required to rebuild if the premises are destroyed by inevitable accident does not relieve him from liability to pay rent in that event.

§ 81. **Same: Statutory rules. Eminent domain.** There are statutes in a number of states providing that in case of the destruction of the buildings on the premises by inevitable accident, the lessee shall be relieved from payment of the rent in proportion to the value of the use of the building destroyed. These statutes do not apply to destruction of such nature that repairs may be made without rebuilding, unless the premises are rendered untenantable, nor to destruction from gradual decay. In no case is the lessee entitled, after the destruction of the premises, to recover back any part of an instalment of rent paid in advance. If the tenant desires to avail himself of the benefits of these statutes, he must abandon his lease and surrender possession to the lessor. The statute was not designed to absolve him from the payment of rent and permit him still to retain possession and continue to enjoy the premises. He is sufficiently protected from the hardships of the common law rule if he is given an election to continue or terminate the lease, upon the destruction of the buildings.

Public appropriation of the premises by eminent domain does not relieve from liability for rent. The tenant

(5) Graves v. Berdan, 26 N. Y. 498.

receives from the public as compensation the value of his lease, and must continue to pay rent (6).

§ 82. **Payment of rent: To whom payable.** Payment in advance may be required by the terms of the lease, but whether required or not, actual payment in advance is a good payment against the lessor and all others, his assigns, grantees, and creditors. The rent must be paid to the lessor or his grantee, heirs, assigns, or their duly constituted agent; no payment to any other will be of avail in discharge of the rent, unless it is made to protect the tenant from a paramount title, as to the lessor's lessor to avoid forfeiture of the term, or by order of court on judgment in garnishment in favor of the lessor's creditor, or in making repairs the lessor has covenanted with the lessee to make and pay for, or the like. Payment may be made to the officer having a distress warrant. Payment may also be made to the attorney prosecuting the suit for the lessor to recover the rent. It has also been held that payment to one in possession claiming title and of whom the tenant leases is good for all rent accrued and paid for before judgment against the claimant in possession.

§ 83. **Same: Medium of payment, time, and place.** The medium of payment may be money or anything else the parties may agree on, but an agent to collect rent cannot agree to accept anything else than the rent specified in the lease, without special authority. This applies to attorneys and sheriffs. The taking of the tenant's note, check, or security for rent is not payment; but the

(6) Stubbings v. Evanston, 134 Ill. 37.

acceptance by the lessor of another's note or check is presumptively in payment. If the rent is a pair of spurs at Easter or twelve shillings at the next feast, the tenant must pay the spurs at Easter or his election is gone, and at the next feast he can pay only money. An agreement to pay in money or provisions gives the choice to the tenant. A tender in the kind agreed must be made at the time agreed, not before nor after; but if then made and refused, stops all right for interest while the tender is kept good, and deprives the lessor of the right to recover costs if he sues for the rent later while the tender is kept good. If the rent falls due on Sunday or a holiday payment the next day is in time. If no place of payment is specified, it is payable on the land, and the lessor must come to demand it before it is in default. The lessor has a right to refuse a tender under such circumstances that he is unable to count the money if the tender is conditioned upon its being accepted in full.

§ 84. **Same: Receipts, application of payments, and mistakes.** The lessee making payment has a right to demand a receipt under the hand of the lessor or his authorized agent. Such receipts are presumptive evidence of payment but may be explained and disputed. A receipt for one month's rent raises a presumption in the absence of indication to the contrary that the rent prior to that has all been paid. The lessee has a right at the time of making the payment to direct how it shall be applied, whether to the past or future, and to what month; but if he does not then specify how it shall be applied, the lessor may apply it to any demand due that

he has against the lessee. But if the lessor receives from one of joint tenants money he knows to belong to both, and which he knows is intended as payment of rent, he has no right to apply it on his claim against one of them because no specification as to application was made. Payments in advance in absence of knowledge that the lessor had no title or that the lessee had been evicted, or by mistake in excess of liability, may be recovered back unless the tenant has enjoyed the advantage of it. If the tenant pays in advance and is evicted during the term, he may recover a proportionate part of the payment if the eviction was by paramount title, but not for the accidental destruction of the premises by fire or otherwise.

§ 85. **Remedies of landlord for rent.** The principal remedies of the landlord for the recovery of the rent are the seizure of a distress by virtue of common law, lease, or statute; the enforcement of a lien on the tenant's goods therefor, given by the lease or by statute; an action of covenant, debt, assumpsit, or for use and occupation; or a right to enter and oust the tenant for breach of condition in the lease, that if he or his assigns fails to pay the rent due at the appointed time the lessor or his heirs may enter and terminate the lease, and the lessee and all claiming under him remove and put out, and thereupon bring ejectment. The condition is no redress in itself; it merely enables the landlord to stop further accumulation of rent, and terrorizes the tenant to pay for fear he will lose his lease.

§ 86. **Distress: In general.** The common law distress was not in itself a remedy, but merely a coercive measure

to embarrass the tenant till he would pay to be relieved. It consisted in the seizure of the tenant's goods, and was available to the lessor only when rent was in arrear beyond the time allowed by law for payment, and was certain in amount or reducible to certainty. It must also be payable at a certain time, or it could not be alleged to be in arrear. If distress is wrongfully taken the lessee may recover it and costs in replevin for the wrongful taking. At common law no right to take distress existed unless there was a tenure between lessor and lessee or the right was expressly reserved in the lease. While the lessor held the distress he was barred of action on the covenants for the rent. Where the right to take distress now exists it is so regulated by statute as to avoid most of its common law rigors, and reduce it to a summary process for recovery of rent. It is believed that there is no right to take distress in Alabama, Michigan, Massachusetts, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma, Wisconsin, and probably other states. At common law a distress could be levied only on the demised premises, and the goods of a stranger found on the premises were in many if not most instances liable to seizure for this purpose; but now by statute in several states where taking of distress is allowed, the distress may be levied anywhere in the county, but only on the goods of the tenant. This remedy is available only for non-payment of rent, and is not available as a remedy for breach of other covenants; but where personal property is leased with the premises for one rent, distress for the whole lies. Unless the relation of landlord and tenant

exists this remedy is not available, but it has been held to lie on an oral lease, or a lease void for want of writing. Distress lies for rent in money, produce, service, or whatever it be so it is rent.

§ 87. **Same: Tenant's defenses.** At common law the rule was that termination of the relation of landlord and tenant terminated the right to take distress, but did not entitle the tenant to the release of distress already taken till the rent was paid. To obviate the difficulty of this rule, it has been provided by statute in some of the states that distress may be taken within a certain time after the termination of the relation, usually six months, and though the relation is terminated by expiration of the term, or notice to quit, but not by forfeiture. If the tenant at will died the lease was ended with the death and also the right to take distress; but on death of a tenant for years his executor stood in his place, or after appointment his administrator if he died without executor; and against these the lessor might distrain, but if the lessor took the office he waived his right. Agreement of the lessor not to distrain, eviction by the lessor or a paramount title, tender of the rent by the lessee, presence of the lessee on the land when it was due and failure of the landlord to come for the rent, a grant or assignment of the reversion by the lessor, a release or accord and satisfaction, are each separately a good defense to a distress. Wrongful distress will not be restrained in equity, since the tenant's remedy by replevin is complete.

§ 88. **Same: Who may distrain? Incidents of distress.** A joint tenant may distrain for the whole rent, a

tenant in common for his share, a guardian for his ward, husband for his wife, receiver or assignee in the place of the assignor, mortgagee in possession in place of the mortgagor, or executor in right of his testator by statute, though not at common law. To make a distress complete there must be a seizure, but it has been held that notice by the landlord to the tenant or posted on the goods not to move them is sufficient. The person taking the distress is bound to take reasonable care of the goods and has no right to use them except for the benefit of the owner. If the property is injured through his neglect he is liable to the tenant in damages, and an injury will be presumed to be due to his neglect. Rescue of distrained goods by the tenant gave the landlord an action for damages and the right to take the goods wherever he could find them, and the tenant was also liable criminally. Release by the lessor at the request of the tenant or procured by his fraud entitled the lessor to take a second distress, but in the absence of some legal cause the lessor could not take a new distress after having levied sufficiently and voluntarily abandoning it.

§ 89. **Same: What is distrainable?** Only personal property on the premises was distrainable at common law, excluding real fixtures, growing crops, and wild animals not confined. Perishable commodities, articles in course of manufacture, and all chattels in the actual use of the tenant at the time, such as the horse he is riding, or the ax he is using, are exempt at common law. Beasts of the plow and implements of trade could be taken only as a last resort. The goods of the guest at a hotel, or sent

to an auctioneer or commission merchant for sale are not liable to distress for the rent of the hotel-keeper or auctioneer. All goods in the hands of the sheriff on execution or otherwise in the custody of the law are exempt. By statute, 8 Anne c. 14 § 1, it was provided that the sheriff should not take the goods of a tenant on the premises without payment of the tenant's rent arrear not exceeding one year, and this statute has been re-enacted in this country in some states.

§ 90. **Same: Mode of levy.** The landlord had no right to break into the lessee's house to levy a distress, but might come in and levy if he found the door open, or might enter through an open window, though it was necessary to open it further to get in. Of course he might climb over a fence or wall to get in. He was liable for breaking into the buildings other than the house without demanding admission first, if the tenant's lock or other goods were injured thereby; but after demanding admission he might break into any building other than the dwelling house. By modern statutes the lessor has no right to take distress without a warrant issued by some officer, and by some statutes the levy can only be made by an officer. At common law the landlord or his agent might take the distress, and no warrant from any public office was necessary. The statutes also often require the landlord to give a bond to secure the tenant from damages from illegal use of the warrant.

§ 91. **Same: Statutory sale.** Where a warrant is issued by a court it is usually returnable, and by the appearance of the tenant may result in a trial and judgment

as in civil cases in court, with costs, execution, and sale of the property as a result. At common law the lessor had no right to sell the distress, but only to hold it till the rent was paid. This was changed in 1689 by a statute permitting a sale for rent, after certain formalities. Statutes permitting execution and sale provide for the time and place of sale and the publication of notice for several days by posting in a public place. In case of sale it is made by a sheriff or constable, and the surplus realized above the judgment and costs of the sale is delivered to the tenant. Immaterial or clerical defects in the proceedings do not affect the validity of the sale; but failure in a substantial respect to pursue the requirements of the statute may render the whole proceedings wholly void. For illegal use of the warrant the lessor is liable if party to it, and also the officer guilty of the wrong. If the distress was illegal and void the recovery by the tenant would be the value of the goods at the time of the taking, regardless of what they sold for.

§ 92. **Lessor's lien for rent: Validity against tenant's creditors and vendees.** In the absence of statute or agreement between the parties there is no lien in favor of the landlord on the goods of the tenant for the payment of the rent. And while they may make an agreement that will be good between themselves, if supported by sufficient consideration, without any writing to prove it, unless made before or at the time of the lease so as to be impliedly abandoned unless embodied in the writing; yet as against subsequent purchasers in good faith without notice, such an agreement is void unless it is written and

recorded as required by the law concerning chattel mortgages to make them valid against creditors and purchasers, for such an agreement is in substance a chattel mortgage. It is not a pledge, because the lessor is not in possession. Likewise, an agreement by the tenant to execute to the landlord a mortgage to secure the rent, or to pledge personal property to him for that purpose, gives the lessor no rights against the tenant's creditors and vendees without notice if the mortgage has not been given or is not properly made or recorded, or the pledge has not been made and deposited. An agreement between the parties that the tenant's property shall not be removed from the premises till the rent is fully paid is personal and not binding on the tenant's creditors and vendees without notice.

In several of the states it has been held that even a reservation of the title to the crops raised on the land is not valid against the tenant's creditors if not recorded. In a contest between the lessor and an execution creditor of the lessee the court said: "It was insisted by counsel for the plaintiff in error that this property was not subject to the fi. fa. [execution] of Scott, because at the time of the renting of the land by Almand to Plunkett, a verbal contract was made whereby Plunkett agreed that the whole crop should be Almand's until the debt which he owed Almand for supplies to make the crop had been fully paid off and discharged, although Scott's judgment was older than the contract made between Almand and Plunkett. We do not agree with him in this contention. The evidence clearly shows that the relation of landlord

and tenant existed between Almand and Plunkett. . . . The rule seems to be that where the landlord furnishes the land and supplies, and other things of that sort, and keeps general supervision over the farm, and agrees to pay a certain portion of the crop to the laborer for his work, the laborer is then a cropper, and judgments or liens cannot sell his portion of the crop until the landlord is fully paid; but where there is a renting, and the relation of landlord and tenant exists, an older judgment will subject the renter's crop, although the landlord may have a contract with the tenant in which it is stipulated that the crop is to be the landlord's until the debt for supplies is paid off. If the landlord wishes to protect himself, the law gives him a lien for supplies in preference to the older judgments and liens, and he must take this lien and foreclose it in order to protect himself'' (7).

§ 93. **Same: Special statutory liens.** Where such statutory liens in favor of the lessor exist as are mentioned above, he must pursue the statute to make them effective; and the statutes differ very much in terms. In an action by the lessor for an injunction to restrain a sale of a stock of goods by the tenant's chattel mortgagees, the court said: ''Defendants' position is that as the rent was made payable monthly in advance, and was kept so paid until the commencement of the action, the plaintiff had no claim for rent at that time, and consequently no lien for rent. The question presented involves a construction of § 2017 of the code, which is in these words: 'A landlord shall have a lien for his rent upon all crops grown upon

(7) Almand v. Scott, 80 Ga. 95.

the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution, for a period of one year after a year's rent, or the rent for a shorter period claimed, falls due; but such lien shall not in any case continue more than six months after the expiration of the term.' The plaintiff insists that under this statute he acquired a lien for the rent of the entire term, and that the lien for the whole of such rent attached from the commencement of the lease upon all property of the tenant then on the premises, and upon all other property of the tenant afterwards brought upon the premises, commencing as soon as it was brought. This position we believe to be correct. . . . The disposition of the property by the tenant, as shown in this case, while it may not have been with an actual fraudulent intent on the part of the tenant, yet destroyed the security which the law gives the landlord for his rent, and in this sense defrauded him of his statutory lien. In short, if the right to the lien for rent not yet due be conceded, it follows that the landlord should, by proper proceedings, be enabled to prevent such a disposition of the property as would make the security worthless'' (8).

§ 94. **Same (continued).** These statutory liens begin as soon as the relation of landlord and tenant is created and the property brought onto the premises, and not before, and unless the statute so provides it is not necessary to the validity of the lien that the lease be in writing or that it be recorded even if written. But the legal title and

(8) Martin v. Stearns, 52 Iowa 345.

right to possession remain in the tenant subject to be divested by the appropriate proceedings. The statutes usually extend only to rent and supplies furnished by the lessor, and will not be extended by the courts by construction. The rent includes all rent in arrear, and in some states rent to accrue, also the costs and expenses of the proceedings to force payment. The supplies include only supplies furnished by the lessor himself. He has no lien by reason of merely guaranteeing payment, but it is not necessary that the supplies pass through his hands. The lien covers only property of the tenant that has been on the premises unless the statute plainly includes more. It does not extend to the proceeds of property sold, nor to insurance money for property destroyed, nor to property of third persons, nor to choses in action of the tenant. Where it extends to crops raised on the premises, as it usually does, it includes crops raised by undertenants of the tenant. A stranger dealing with the tenant and learning facts which put him on inquiry, and which if pursued would inform him of the landlord's lien for rent, is charged with knowledge of the lien, and if the statute creating the lien provides no protection for persons having no notice thereof, they are postponed to the claims of the landlord for rent whether they knew of his lien or not. A landlord may expressly waive his lien; or he may do acts which will estop him from claiming it against certain persons, as if he says he has been paid or does other acts on which other persons rely and act to their injury; or he may impliedly waive the lien, but taking other security is not a waiver. The proper remedy for

enforcement of the lien depends on the provisions of the statute.

§ 95. **Attachment for rent.** In a number of the states the statutes provide for a peculiar attachment in favor of lessors for the recovery of rent, differing from the ordinary attachment open to any creditor. If a lessor proceeds under the general law of attachment open to all creditors he must comply with it to succeed, and if he proceeds under the attachment for lessors he must show in his papers what that law requires to be shown and must obey it, and cannot succeed by proving and proceeding as required by the general attachment law. This peculiar remedy is available only for the recovery of rent, not to recover on demands for breach of other covenants in the lease. Under most of these statutes the attachment is limited to property subject to the landlord's lien. The only safe guide as to the procedure, grounds for attachment, etc., is the statute of the particular state. Under most of the statutes the grounds for attachment mentioned are acts such as endanger the collection of the rent, such as removal of the property of the tenant from the premises. The remedy is limited to the lessor or the assignee of the reversion, and is not open to the assignee of the rent. For a wrongful attachment under these statutes an action for damages lies in favor of the injured tenant.

§ 96. **Action for rent: Parties.** As the covenant to pay rent runs with the land and the reversion, the failure to pay the rent at the agreed time by the lessee or his assignee entitles the lessor to an action of debt or cove-

nant against the lessee and also against the assignee, and the assignment is no defense to the action against the lessee. Also the grantee of the reversion succeeds to the rights of the lessor, and may sue the lessee for non-payment of all rent accrued before he assigned and against the assignee for all the rent accruing while he holds the term.

§ 97. **Same: Forms of action.** To maintain the action of debt it is essential that the rent be for a certain amount, but it is not necessary that the lease be in writing. To maintain the action of covenant it is essential that the lease be in writing under seal. In any action for rent it is essential that the rent was due on a day before the action was commenced; if the action is commenced on the day the rent falls due it is premature and will fail. No demand for the rent is necessary before commencing an action for the rent. Because the lessor can maintain no action for the rent against the lessee's subtenants, for want of privity with them of either contract or estate, it has been held in a few cases that in case of the insolvency of the tenant the lessor may maintain an action in equity against the subtenant to have his rent applied to pay the lessor; the same result could usually be accomplished by the lessor without going to equity, by merely distraining the subtenant's goods, or requiring him to pay on penalty of being ousted for breach of the condition in the lease that if the rent is not paid the lessor may enter and terminate it. Where such remedies exist, the right to resort to equity would scarcely be allowed. Assumpsit will lie on a lease express or implied, written or oral, un-

der seal or without, and is the only action maintainable for use and occupation without any express agreement. All of these actions may be prosecuted wherever the lessee can be found and service obtained on him. Assumpsit is the most usual action for rent under the late acts on reformed procedure in the states still retaining the common law forms of action. In about half of the states all forms of action are reduced to one, and this discussion as to the form is unimportant.

§ 98. **Same: Defenses.** The action may be defended by proof of infancy of the lessee, payment, surrender and release, accord and settlement, eviction, abandonment because of the fraud of the lessor in obtaining the lease or untenantable condition of the premises resulting from the lessor's breach of his covenant to repair. It is no defense that the lessor has not performed his part of the contract unless the covenant to pay rent was dependent on performance by the lessor. The defendant may counterclaim in the action for rent, if properly pleaded, any damages he is entitled to for breach of duty by the lessor to repair, or any injury he has suffered from the breach of other covenants. The tenant may also set-off anything he has been compelled to pay on taxes, repairs, or the like, which the lessor ought to have paid, and which the lessee had to pay to obtain the enjoyment of the lease as he was entitled to it.

CHAPTER VI.

FIXTURES AND THE RIGHT TO REMOVE THEM.

§ 99. **In general.** A chattel annexed to land is called a fixture; and in another sense the word is used to include only such personal chattels as have been so annexed to land as to lose their character as chattels and become real property for certain purposes. There is no rule by which all cases can be determined; and there are cases which no rule can be certainly said to determine. The considerations which determine the question are the nature of the annexation, the adaptability of the chattel to the use of that part of the realty, the person by whom the annexation is made, and his interest in the chattel and in the land. Let us look at each of these points of view separately.

§ 100. **Nature of annexation.** If the thing is so annexed to the land that it has lost its original physical character and cannot be restored to its original condition as a practical and commercial matter, it has lost all of its chattel nature and is real property for all purposes and between all persons. For example, if A should steal B's paint and paint A's or C's house with it, the paint has lost its original character as a commercial commodity known as paint, and is not capable of being restored to its original condition as a commercial transaction; for it has been absolutely incorporated into the realty so as to lose its original character, it is no longer a chattel for

any purpose or between any persons, but is inseparably annexed to and made part of the land to which it is annexed. We might go further and say that if A should steal B's shingles and with them make a roof to A's house, all that has been said of the paint would be true of the shingles; but it is readily seen, that as we progress down the scale, a point will soon be reached where B would have a right to recover his chattel notwithstanding the wrongful annexation of it by A to his own land. It is manifest, therefore, that in only a small number of cases can the method of annexation itself, alone, be decisive of the question as to whether the thing is now land or still a chattel for the purposes of the particular case.

§ 101. Annexation not indispensable in special cases. Indeed, it would not be difficult to imagine a case in which the thing has become real property for practically all purposes and yet is not annexed at all, as if A should steal B's ore, and with it make a key to the door of A's house. In this case it is believed that B would not be allowed to recover the key by proving that it was made from his ore. He could recover its value in an action against A for damages, and he might be able to maintain a bill in equity under some circumstances to establish a lien on the land for the value of his property that had been used to improve the land; but the thing has for all purposes lost its nature as a chattel and become land for all purposes, without ever being annexed to the land at all. And yet in most cases the method of annexation, while not of itself decisive of the character of the thing that was a chattel, may be important as an element of

the decision of the question. It may indicate whether the intention at the time of annexation was for the thing to remain permanently where it was put, or whether it was placed there merely for a temporary purpose. It is only in the small class of cases in which the thing is peculiarly and exclusively serviceable for use in connection with the particular realty, that it can be regarded as realty without any annexation at all, such as the case of the key to the house door, the stone of the grist-mill, the saws of the saw-mill, and the like; where the house, or the mill would largely lose its usefulness without the fixture which requires in its use to be regularly attached and removed. Ordinarily no chattel becomes a part of the realty unless it is annexed and held in place by something more than its own weight, except in the case of chattels so large that mere weight makes permanent annexation, such as monuments, houses, and the like, and even as to these the ground is usually prepared to receive them.

§ 102. **Constructive annexation and severance.** What is effectually annexed to the land may be constructively severed by a sale of the fixture as a chattel by the owner of the land and chattel. Admitting that the thing is a true fixture and real property, the owner of the land and fixture may by a sale of the fixture make it the personal chattel of another. In such cases it is matter of debate whether the transfer must be sufficiently formal to pass an interest in land, and the majority of the courts would seem so to hold. On the other hand, it has been held that there may be a constructive annexation, as in the case of the saw and mill-stone above mentioned (§101). Again,

there are a number of cases in which it has been held that an intention by the owner of the land to annex chattels to the realty and putting them on the ground or near it constitute such a constructive annexation as to make them fixtures before they have ever been in fact annexed. A man owning some city lots and being in the process of erecting a business block on one of them with structural iron and cut stone lying about for that purpose, gave a deed of the lots as security, and later sold the building material. It was held that the deed carried the building material, so that the holder of the deed had better title than the holder of the bill of sale. The court said: "The stone had been cut and dressed for the front of the building. Each piece of structural iron was of the dimensions provided in the plan of the building, and fit for the place where it was to go. At that time it was intended that the building would be completed. . . . It was surely intended that the incomplete building should be transferred to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance" (1).

§ 103. **Adaptability to use of realty.** A chattel may be so exclusively adapted to use in a particular part of realty that it is of no value in any other place, as the key to the house door; and in this class of cases adaptability is of itself sufficient to make the thing realty in all cases and for all purposes. Or the adaptability may be

(1) Byrne v. Werner, 138 Mich. 328.

such that the realty requires such a chattel to make it complete, though the chattel would be equally serviceable in many other places, as in the case of the saw in the mill; and in this class of cases the adaptability is not enough alone and of itself to determine in all cases whether the thing is still a chattel or is to be a part of the realty. If annexed by the owner of the mill it might pass without mention as a part of the mill, if he should sell the mill, mortgage it, or devise it by his will. On the other hand, if the same saw were put on the pinion by a lessee of the mill, for use during his term, he would undoubtedly have the right to take it with him when he left the premises; likewise, if the owner of the mill stole it, or bought it on contract that the title should not pass till he paid for it, the owner of the saw would undoubtedly have the right to take it from him notwithstanding the annexation, and this even against a creditor of the mill-owner who had taken the mill on execution against him. From what has been said it will be seen that in the great majority of cases the adaptability of the thing to use in connection with that part of the realty is only a fact to be considered in connection with the method of annexation and the interest in the chattel and land owned by the annexer. If a large number of parts go to make up a single machine, the character of each of the parts is usually determined by the character of the whole.

§ 104. **Relations of the parties to the chattel and to the land.** In most cases neither the manner of annexation, nor the adaptability of the chattel to the use of the land, nor both combined, are sufficient to remove the

question from debate; and, therefore, resort is usually had to the presumed intention of the parties, indicated primarily by what would be most advantageous to the annexer and owner of the chattel, and modified by any agreements of the parties in interest in so far as they had a right to determine the matter without prejudice to the rights of others. This point is excellently illustrated by what was said in one case, in which the court held that one who had sold a boiler to a mortgagor to be put into the mortgaged mill was entitled to recover its value of the mortgagee after foreclosure, because the mortgagee refused to permit the seller to remove it, according to the agreement with the mortgagor that title should not pass till payment in full and that in case of default the seller might retake it. The court said:

"The question may be decided by the presumed intent of the party making the annexation of the chattels. The law makes a presumption in the case of anyone making such an annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes, because the interest of a tenant in the land is temporary, that he affixes for himself with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold and in agreement with known usages. The law presumes, because the interest of the vendor of real estate, who is the owner of it, has been paramount, that he has made annexations, for himself to be sure, but with a view to

a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that improvements which he makes thereon, by the annexation of chattels, he makes for himself, for prolonged enjoyment and to enhance permanently the value of his estate. These are presumptions of the intentions of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all with the relation of the lands, or with the purpose of the landlord, or the vendee, or the mortgagee, though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts. It is recognized that the express agreement of a tenant may prevent him from exercising his right to detach his annexations; which is the same as to say that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose which would otherwise arise, is repelled. . . . The general rule governing the rights of parties in chattels thus annexed to the real estate rests, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their pur-

pose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different; not a different purpose in those holding a relation which may be hostile, but their own different purpose. Hence I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurrent intention of the defendants as prior mortgagees'' (2).

§ 105. **Right of lessee for years and his assigns to remove fixtures.** In view of the rules and considerations above mentioned, the most definite rule that can be formulated as to the right of the lessee and his assigns to remove fixtures annexed by them if the lessor or those claiming under him object, is, that if the fixture can be removed without substantial injury to the freehold, that is, leave the land in substantially the condition it was in before the fixture was annexed, the lessee may remove it. If the lessee does not like the lock on the door of the house and puts on another in its place or in addition, and the removal of the lock he has added would leave a hole in the door, or leave it in an unsightly condition, he cannot take the lock with him. This is because he will not be presumed to have intended to do an injury to the property of another, and he will not be permitted to do so even if he so intended. But, on the other hand, he is not under any obligation to equip the premises, in the absence of contract to that effect, and so may remove

(2) Tifft v. Horton, 53 N. Y. 377.

anything annexed by him if its removal will leave the premises in their original condition and the thing attached will not be substantially destroyed in removal. This was not always so; in the old English law, fixtures could not be removed by tenants; then an extension of a privilege to trade tenants to remove was allowed as an encouragement to trade; this was later extended to agricultural tenants; and finally was made general.

§ 106. **Trade and agricultural fixtures.** The right of tenants for years to remove their fixtures is shown by a celebrated case in the Supreme Court of the United States. In 1820 Van Ness leased a vacant piece of land to Pacard for seven years, at a yearly rent of $112.50, with a clause in the lease that the tenant should have the right to purchase at any time during the term for $1,875. Pacard went into possession, built a wooden house two stories high in front, a shed of one story, a cellar of stone or brick foundation, and a brick chimney. He was a carpenter by trade, dwelt in the house with his family, kept two apprentices in the house and workbenches and tools about, kept cows, and used the cellar and a spring therein for the milk to be sold. He erected a stable for his cows, out of planks fixed upon posts set in the ground. At the end of his lease he took down and removed from the lot all the material he had placed on the premises during his term. For this an action of waste was prosecuted against him by the lessor. The Supreme Court said:

"The general rule of the common law certainly is that whatever is once annexed to the freehold becomes a part of it, and cannot afterward be removed, except by him

who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader case, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in Elwes v. Mawe (3), and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided that in the case of landlord and tenant there had been no relaxation of the general rule in cases of erections solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant they became a part of the realty and could never afterward be severed by the tenant.

"The distinction is certainly a nice one, between fixtures for the purposes of trade and fixtures for agricul-

(3) 3 East, 38.

tural purposes; at least in those cases where the produce constitutes the principal object of the tenant and the erections are for the purpose of such beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in Elwes v. Mawe. The common law in England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their general situation. There could be little or no reason for doubting that the general doctrine as to the things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive

to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however, necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

"It has already been stated that the exception of buildings and other fixtures for the purpose of carrying on a trade or manufacture is of very ancient date, and was recognized almost as early as the rule itself. . . . It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick chimney or not. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large

as well as a small messuage, or a soap-boilery of one or two stories high, and on whatever foundation he may choose. . . . Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now what was the evidence in the present case? It was, 'that the defendant erected the building before mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.' The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operation of this trade.'' The judgment for the defendant was affirmed (4).

§ 107. **Right of vendor, mortgagor, and executor to remove.** In the foregoing case a view is given of the notion that prevailed nearly a hundred years ago in this country, and which may be taken as the least favorable view to the tenant that would be held in any state of

(4) Van Ness v. Pacard, 2 Peters 137.

this country at this time. It will be instructive to compare this with a recent decision (5) between mortgagor and mortgagee (between whom the rule would be the same as between vendor and vendee, executor and heir), which goes as far to the other extreme, and probably would not be followed by the majority of courts even at the present time.

"The respondent borrowed $6,000 from appellant, and secured payment of same by a mortgage upon two lots in Seattle, on which was at the time a residence in which were domiciled respondent and family. At the time of the execution of the mortgage, there were in the residence four mantels. These mantels were of hardwood, the frames standing above the brick projection of the fireplace, and extending down each side to the floor. They were about seven or eight feet high, consisting of a large center plate mirror, and a series of small mirrors, brackets, and shelves. Subsequent to the execution of the mortgage, there was also placed in the residence a porcelain bath-tub standing on four legs, and connected in the usual manner with the soil pipes. A hot-water heater was also connected with the building by the usual methods of plumbing. Appellant foreclosed its mortgage; and, upon the vacation of the premises by the respondent, he took from the house the mantels, the hot-water boiler, and bath-tub above described. The present action was brought to replevy the said mantels, bath-tub, and heater. The matter was submitted to a jury, and a verdict was

(5) Philadelphia M. & T. Co. v. Miller, 20 Wash. 607.

rendered in favor of the respondent. Judgment was entered, from which this appeal was taken. . . .

"In investigating a question of this kind, we cannot shut our eyes to the many changes that have been wrought by time in the fashion and character of household furnishings. Anciently mantels were uniformly built as a part of the house, and therefore became a fixture to the realty. The house was built with reference to the mantel, and the mantel with reference to the house. It was a part of the plans and specifications of the house, and could not have been moved without materially affecting, not only the appearance, but the real usefulness of the house. But advancing mechanical science and taste have evolved an altogether differently constructed mantel; and mantels such as are described by the testimony in this case are now constructed without reference to any particular house or particular fire-place. They are what are called 'stock' mantels, and are sold separately, and made adaptive to any kind of house. They are, in fact, as much a separate article of merchandise as a bedstead or a table. So that, regarding the changed conditions in this respect, the rules of law must be changed and adapted to the changed character of the furniture. A few years ago, sideboards were constructed in, and were made a part of the house, and were of necessity fixtures; while now they are ordinarily separate pieces of furniture, and by common consent, are moved from house to house. The same advancement has been made in bath-tubs. The old-fashioned bath-tub that was sealed in, and actually made part of the bath-room, has largely given place to the more convenient bath-tub

that rests upon legs and can be attached to any heating system that happens to prevail in the house where it is used. And so with heaters and boilers. In this instance the boiler is in no way attached to the building except by the plumbing connections. It could be detached without in any way injuring the realty; and we see no reason why it should be considered a fixture any more than the ordinary stove which is connected by pipes to the boiler and to the plumbing system generally. One could be as easily detached as the other, and yet we think it has never been held by any court, or contended by anyone that a stove, though connected by pipes to the plumbing system, was a fixture which could not be removed. . . . The testimony shows that the building back of the mantels, or that portion of it which was concealed by the mantels, was plastered and calcimined, that for about three years the mantels were not fastened to the wall in any way, but supported themselves in the position they occupied; and that after that time they were fastened to the wall by screws, to render them more stable and keep them from toppling. The boiler and the bathtub were not placed in the building for several years after the mortgage was given." Judgment affirmed.

§ 108. **When removal must be made.** The executor of the life tenant must remove his fixtures within a reasonable time after the death of the life tenant. The vendor must remove what he has a right to remove before he gives up possession to the vendee. The lessee for years must remove his fixtures before the end of his term; and the same is true of a tenant at will, he must remove before

the end of the six months he has to quit after notice. Some courts have held that if a tenant for years takes a new lease without expressly reserving the right to remove his fixtures at the end of the new term, he has lost his right, unless he has taken the precaution to remove them at the end of the first term. Upon this point a very instructive and persuasive decision was rendered by the supreme court of Michigan, in which the opinion was given by Judge Cooley. The lessees had a lease for ten years with the express right to remove any of their fixtures at any time within thirty days after the end of the term. After they took possession and erected certain buildings the lessor gave a mortgage on the land; and at the end of the term a new lease was taken for five years and five months. In a suit by the mortgagee to foreclose, it was claimed that the tenants had abandoned their right to remove their fixtures by not removing them within the first term and thirty days and not reserving the right to remove them at the end of the second term. The court said:

"The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundations in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the

protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord.' There are some authorities which lay down this doctrine."

The court then quotes from another decision these words: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the

buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord." He then adds: "This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable" (6). Judgment was given for the tenant.

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(6) Kerr v. Kingsbury, 39 Mich. 150.

CHAPTER VII.

TERMINATION OF THE RELATION.

§ 109. **Necessity of action for possession.** If the tenant does not surrender possession without notice at the end of the term for years, the lessor may lawfully enter and take peaceable possession without any notice to quit or judicial aid; and according to the decisions of Massachusetts, Maryland, New Hampshire, and Rhode Island, the tenant cannot maintain any civil action for damages if the lessor enters and forcibly ejects him without process when he holds over the end of his term; for he has no right there, and the injury, if any, is due to his wrongful opposition and not to the force of the landlord, provided no unnecessary force is used. Even in these states it is held that the landlord is liable to a criminal prosecution for breach of the peace for such a forcible entry. But in a large number of the states it has been held that if the lessor forcibly ejects a tenant wrongfully holding over he is liable to at least nominal damages in a civil action by the tenant for the trespass. See the article on Torts, §69, in Volume II of this work. As a rule the tenant surrenders and abandons when his term is up; but if he does not the lessor may either elect to treat him as tenant for another term at the same rent, or he may make a formal entry and then sue him in trespass, or he may sue him in ejectment without making

any formal entry, or he may bring summary proceedings under the statute of the state to have him ejected. These statutory proceedings enable the owner with the aid of the sheriff to get possession in much less time than could be done by the regular action of ejectment.

§ 110. **Notice to quit: When necessary.** No notice to quit is necessary to terminate a tenancy for life or years. In these cases the estate is ended by the mere death of the tenant for life, or the lapse of time for which the term was to endure. The representative of the life tenant has only a reasonable time to remove the goods of the life tenant. The tenant for years is bound to know when his time is up without any notice from the lessor or his grantee; and if he does not quit the landlord may hold him for another term's rent, or have him summarily ousted. But a tenancy at will, from year to year, month to month, or the like, can only be terminated by due notice.

§ 111. **Same: Service and contents of notice.** This notice must be given by the landlord or tenant or the authorized agent of either; to the landlord anywhere, to his wife or agent at his residence, to the tenant if found on the premises, or to the person he has left in charge of the premises. If there are several tenants in common, notice to one is notice to all. If the possession has been given over to assignees or subtenants, the notice may be served on them or their agents. Service should be made on the tenant in person when this can conveniently be done, otherwise it may be left with his wife, servant, or agent at his residence though not on the demised premises. It may be made by mail, but such service in absence of registry

lacks proof of receipt by the other party. It may be given on Sunday or a holiday. Any manner of service will do which clearly informs. It may be by word of mouth only, but should be by writing, for the sake of making proof, and the person making the service should keep a copy to prove what the notice was. Proof of notice may be made by anyone knowing the fact, or may be waived by the tenant denying that he is tenant, by the landlord accepting another as tenant, or the like. The notice should specify clearly who is to quit, when, and from what premises. Any defects in the notice are waived by the party notified leading the other to believe that he waives the irregularity. If it is the tenant who wishes to terminate the lease, he must serve a notice on the lessor or his grantee, whichever is landlord, specifying who intends to quit, what premises, and when. Mere abandonment of possession by the tenant is not notice to the landlord that he intends to quit the premises, and the lessor may hold him for rent till the lease is terminated by due notice. When a lease is terminable at the option of either party, notice of intention to exercise the option must be served on the opposite party, but the time and manner of the notice may be regulated by the lease in any way the parties agree.

§ 112. **Same: Length of notice.** The length of notice is generally controlled by statute. At the common law a tenancy at will is terminable at any time, but many statutes now require a certain notice, frequently six months, served by either party on the other. Where the tenancy is from year to year (§ 3, above), it could be terminated only by notice to quit or of intention to quit, at a rent day

not less than six months from the time of service of the notice. In a leading case on this subject, ejectment was brought against a tenant holding from year to year under an implied lease of a public house resulting from holding over under a lease for one year commencing at midsummer. On the trial, proof was made of notice served by the landlord on the tenant March 26 to quit Sept. 29. Of this Lord Mansfield, C. J., said: "When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the termination of the term. If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary, for the sake of convenience, that if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year. Now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement. As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there, to be sure, much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract" (1). Since this was not a notice to quit in the middle of the summer, it was

(1) Right d. Flower v. Darby, 1 Term, 159.

not even a good notice to quit in the middle of the next summer. That might not be desired.

Where the periodical tenancy is for a time shorter than a year, as from quarter to quarter, month to month, or week to week, it is generally held in America that a notice equal to the length of the period must be given to quit at the end of a period (2).

§ 113. **Termination by death of parties.** The death of either lessor or lessee terminates a tenancy at will in the absence of statute on the question. But a tenancy from year to year or for years is not terminated by the death of either party. The heir succeeds to the inheritance of the lessor and the executor or administrator to his term if he had but a term; and if it was the tenant who died his representative stands in his place. Of course the lease for life is ended by the death of the tenant for life; but in the absence of statute the representative of the tenant for life has a reasonable time to remove the goods and crops of the tenant.

§ 114. **Termination by destruction, sale, or eviction.** The tenancy is not terminated by any destruction of the thing demised short of a total destruction of it, as in the case of the burning of a building when the premises was a room in the building.

The termination of the lessor's estate ends the relation; likewise the grant by the landlord of his reversion, or the assignment of the term by the tenant, terminates the relation between the original parties by substituting another, but in none of these cases are the contract rights of

(2) 18 Am. & Eng. Ency. (2d. ed.) 204 (collecting cases).

the parties against each other at an end by the termination of the relation of landlord and tenant. If the lessor buys the term or the lessee buys the reversion, the relation is also at an end.

An actual eviction of the tenant by paramount title or the wrongful act of the landlord terminates the relation, and absolves the tenant from liability for subsequently accruing rent, even such as would be past due the next day, as when the landlord enters on the day the rent is due and ousts the tenant for breach of condition to pay the rent that day. Taking part of the premises by paramount title relieves the tenant as to so much.

§ 115. **Termination by forfeiture: Covenants and conditions.** Forfeiture refers to the right of the lessor to terminate the lease for breach of condition express or implied. By the strict rule of the common law none but the parties or their heirs could take advantage of breach of conditions; but by statute the right has been extended to grantees. All conditions are strictly construed by the courts, because they do not favor forfeitures. For example, a condition of forfeiture for non-payment of rent was enforcible only in case there was demand for it on the land the day it was due and near sunset. There is no right to forfeiture for breach of a mere covenant, in the absence of a statute so providing. But there were certain conditions implied at common law, for the breach of which the lessor or his grantee could terminate the lease, though there was nothing said in it as to termination for that cause; thus, it was held that by the tenant committing waste, or attempting to convey in fee to the destruction of the lessor's

title, his term was forfeited by a condition implied in the nature of the lease. There are also statutes to be found in most of the states which provide that the lessor may terminate the lease for non-payment of the rent, and in certain other cases, opportunity being given the tenant by the statute to save his term by performing his obligation within a certain time, as by the day of the hearing on the proceeding to oust him. In the absence of such a statute or a provision for forfeiture contained in the lease, the term is not forfeited by breach by the tenant of his covenant to repair, pay taxes, insure, pay rent, not sublet, not assign, use the premises only for specified purposes, or the like.

§ 116. **Same: Notice and waiver.** Inasmuch as it is purely optional with the lessor whether he will avail himself of the forfeiture, the term is not ended by the mere breach of the condition, for that would enable the tenant to take advantage of his own wrong to escape liability, which the law permits to none. For the same reason, if the lessor desires to avail himself of the forfeiture, he should explicitly notify the tenant of such intention by some clear and unequivocal words or act, such as making entry, bringing suit for the possession, giving a lease to another, or the like. He must also show that he has done everything necessary to avail himself of the forfeiture, and has done nothing since the act with knowledge of it which amounts to a waiver of the default, such as accepting rent accruing since the breach, demanding or bringing suit for it, or neglecting to assert his right till the tenant has had time to assume that no forfeiture would be de-

manded and has acted on that assumption. Equity will generally relieve the tenant from forfeiture when compensation can be made.

§ 117. **Same: Waste, disclaimer, and notice to quit.** By the statute of Gloucester (1278) 6 Edw. I, c. 5, which is believed still to be the law generally in this country in this respect at least, it was enacted that an action of waste shall lie against any tenant for life or years, and on proof of waste the plaintiff shall recover the premises wasted as well as damages. The forfeiture is merely of the part wasted and not of the whole premises (4). Since notice to quit is necessary to oust a lawful tenant at will, one who commits waste forfeits his right to notice to quit. Likewise, a tenant for life, years, at will, or from year to year, who denies the landlord's title and sets up title in opposition to him, thereby forfeits his term and all notice to quit. The rule of forfeiture for disclaimer or waste is based on the principle that there is tacitly annexed to every lease a condition that if the lessee shall do anything that may injuriously affect the title of his lessor, the lease shall become void, and the lessor be entitled to re-enter; and also on the further ground that if the landlord were not entitled to sue immediately for possession he might lose his lands by the tenant's adverse possession or destruction of the premises. In one case the court said: "The tenant, having disclaimed the title of the landlord and his own relation of tenant, cannot invoke the protection and advantages of that relation. The defendant's answer expressly makes this denial of title and holding

(4) Jackson v. Tibbetts, 3 Wend. 341.

the possession as tenant, or that plaintiff was entitled to the possession. The effect of this denial was to make the defendant a trespasser. He was not entitled to any notice to quit. Whenever he assumed to hold in defiance of the plaintiff's title, the plaintiff was authorized to maintain his action for the recovery of the premises, and he could not set up the denial of title, and then claim the benfit of holding in subordination'' (5).

§ 118. **Surrender.** This is a yielding up by the tenant and acceptance by the landlord of the possession of the demised premises in such a way as to extinguish the term by mutual consent, and may be either express or implied. In sustaining an injunction obtained by a lessor to restrain removal of a tenant's goods subject to the lien for future rent, it was contended that the term had been surrendered. The court defined surrender, and then added: ''The lease being terminated by agreement, the lessee is, of course, discharged except for rent already accrued. To constitute such agreement it is not necessary that express words should be used to that effect. It is sufficient if the reasonable inference from the acts of the parties and the circumstances under which they are performed is that such was the understanding. But where acts are relied upon as evincing the understanding they should be such as are not easily referable to a different motive. No express agreement was made in this case. The acts relied upon as evincing the agreement were the acceptance of the keys by the plaintiff, and the leasing of the property to another tenant. But the plaintiff insists that these acts

(5) McCarthy v. Brown, 113 Cal. 15.

are insufficient because, after the premises were vacated and the keys left with him, he could not properly refuse to receive the keys and take charge of the property, and lease it to another person for the best rent which he could obtain, so as to diminish the damages which he would otherwise sustain. There is much force in this position. What the inference would be from the mere receipt of the keys and the leasing of the premises by the landlord to another person, we need not determine. There is a circumstance in this case which we deem of controlling importance. The plaintiff, at the time of the alleged surrender, had brought this action to secure the payment of the rent yet to accrue. He had brought it in view of an apprehended abandonment and the fact that the rent called for by the lease was greater than the actual rental value; yet not a word was said about dismissing the action, or discharging the lessee from the claim made in this action. In our opinion no discharge was agreed upon, and the defendant Stearns remained liable'' (6).

§ 119. **Same: Conflicting views.** In an action by a landlord against a tenant for damages, the court said: ''It appears that defendants removed from the premises June 30, 1888, and sent the keys to plaintiff, claiming that plaintiff had not complied with his contract. Plaintiff did not at once enter, but on Aug. 3 commenced an action to recover rent for the months of July and August; September 1, while that action was pending, he called upon the defendants and requested them to return and occupy the premises, which they refused to do. He then took posses-

(6) Martin v. Stearns, 52 Iowa 345.

sion, had the front painted in order to obliterate the defendants' sign, made necessary repairs, tried to find a new tenant, and finally rented them to Guan Kee for a laundry, for five years from October 1, at $40 per month, which he says was the very best he could do. The new lease extended nearly one year beyond the term of the defendants' lease. So far as appears nothing was said or done by plaintiff, other than as above stated, to qualify his acts in taking possession, and reletting. He did not inform defendants that he did not accept the offered surrender, nor that he would relet on their account. This suit was commenced December 3, 1888.

"Do these facts show a surrender of the term? A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds, it can be done only by express consent of the parties in writing, or by operation of law when the parties do something which implies that both have consented. These acts are such as the parties would be estopped from disputing, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord if the tenant acquiesces, or the giving of a lease to another. And any act which will amount to an eviction will estop the landlord, and make a formal surrender unnecessary. And, while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is quite independent of the intention of the parties that their acts shall have that effect. . . . The landlord may accept the keys, take possession, put a

bill on the house 'For Rent,' and at the same time apprise the tenant that he still holds him liable for the rent. All this, it was said in Marseilles v. Kerr (7), is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. In that case the trial court had instructed the jury, in effect, that, if the tenant gave up the demised premises, the landlord may re-enter and relet, and that it is for the advantage of the tenant that he should do so, and being for the mutual advantage of the parties, it raises no presumption that the landlord has accepted a surrender. Of this instruction the court said: 'We see no error in this. It is good sense as well as good law.' In that case the landlord expressly refused to accept a surrender, and notified the defendant that he would hold him for the rent.

"While there are many cases which hold to this view, the weight of authority and the better reason are the other way. The term is an estate in lands. The tenant, subject to the covenants of the lease, is the owner of the term. If he leaves the demised premises vacant and avows his intention not to be bound by the lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession of the lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere it is an eviction, and the tenant will be released. The tenant cannot

(7) 6 Wharton, 500.

abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term. If he brings ejectment against the new tenant, what defense can the new tenant have, except that plaintiff's right has ceased? How has it ended unless by surrender? The assertion that the reletting is for the interest of the tenant is gratuitous and unwarrantable, though, if it were true, how would that fact tend to show authority in the landlord to dispose of the tenant's property? Any person might assume authority on the same ground." Judgment for defendant (8).

§ 120. **Right to emblements.** Emblements are the annual produce of the soil resulting from annual planting, such as corn, wheat, and the like; but berries, peaches, and grass, which grow annually from the parent root or stalk, are not emblements, and the way-going tenant is entitled to none of them. If a tenant for a definite term plants a crop which will not mature before the expiration of his term, he has no right to return after his term is out to harvest his crop, for he is bound to know when his time is to be up, and it was his folly to plant what he could not harvest. He must then take them for what they are worth or abandon them. If any tenant terminates his term of his own voluntary act, he has no right to return later to harvest crops he has planted and which had not matured when the lease was terminated. Thus if a widow holding during widowhood should sublet part of the premises and she and the subtenant should each plant crops, and then

(8) Welcome v. Hess, 90 Cal. 507.

she should marry before the harvest, the reversioner or remainderman would be entitled to the crops she had planted, and she would have no right to remain or to return for that purpose. But her subtenant would have a better right; for it is a principle of public policy to encourage industry, and planting would be discouraged if the right to harvest were doubtful. Therefore, the courts hold that if an estate for life or at will is terminated between seed time and harvest the tenant at will or the representative of the life tenant has a right to return after the termination of the term or estate to cultivate and harvest and remove the crop. The same rule applies to an estate for years terminated by some collateral event not due to the fault of the tenant.

APPENDIX A

PERSONAL PROPERTY AND BAILMENTS.

§ 1. Luce holds Green's promissory note for $1,000. What is the legal difference between the nature of Luce's right in the note as the embodiment of his claim against Green and the claim against Green itself?

§§ 2 to 7. To which of the two representatives of the deceased, heir or executor, would the following pieces of property go on the death of the owner: An acre of land, shares of stock in a corporation dealing exclusively in real estate, an annuity, a lease for 10 years, a mortgage that was not yet due, the fish in a fish-pond on the property, a collection of mounted fish?

§ 8. What is the difference between a "chattel personal" and a "chattel real?"

§ 9. What is the difference between a "chose in possession" and a "chose in action?"

§ § 11 to 16. What is the difference in result between bringing an action of replevin and an action of trespass?

§ 18. Thomas was hunting and started a fox and shot it so that it bled but was not seriously hurt. While Thomas was chasing it the fox was killed by Guy, but before either Thomas or Guy could reach it, it was picked up by Chase. Which one is entitled to the possession of the animal?

§ 27. Snow, being under a mistake as to the location of the boundary between his land and Todd's, went on Todd's land and cut and hauled away lumber worth $100 as it stood. He made it into furniture worth $1,500. Assuming that Todd can identify the furniture as made from his lumber, who is entitled to it?

§ 28. Suppose in the above case that Snow had known where the boundary was and purposely gone on Todd's land and cut. Would that make any difference?

Suppose Snow, having cut and hauled away in bad faith, had sold the lumber for $110 to Hill, who bought in good faith and made it into furniture worth $1,500, what would have been the respective rights of Todd and Hill in the furniture?

§ 29. Suppose the fence between Dane's land and Hale's land was blown down by a storm and 300 sheep belonging to Dane and

500 belonging to Hale were mixed together, what would be the respective rights of Dane and Hale in the mixed flock?

§ 30. Jones, Finch and Gray each deposited 5,000 bushels of grain in Young's warehouse. The grain was all in one common bin. Suppose the building and 10,000 bushels of grain are burned, with no insurance. On whom does the loss fall?

§ 32. Suppose in the above case Young had given a receipt that allowed him when the receipt was presented to return either grain of the same quality or the market value of the grain. Would this have altered the result in case of fire?

§§ 34, 35. Olsen ordered three loads of hay from White. While White's driver was on the way to Olsen's barns, Dean wrongfully persuaded him to unload them in his (Dean's) barns. When Olsen discovered this he went to Dean's barns and took away about three loads. He thought the loads sent to him by White were two-horse loads whereas they were only one-horse loads, so he took about twice as much from Dean as he should have. What are Dean's rights against Olsen?

§ 36. Suppose in the last case that Dean's hay had been of an inferior quality to Olsen's; so that the mixture was not so valuable as Olsen's alone would have been. How would that fact affect the rights of the parties?

§ 38. Smith's boat was run down by a tug. When they got into port Smith began proceedings for damages in an admiralty court and attached the tug. The decree of the court directed that the tug should be sold to satisfy Smith's claim. It was sold and bought in by Hall. It later turned out that at the time of the collision the tug was in the hands of a thief who had stolen it from the true owner. As between the latter and Hall, who is entitled to the tug?

§ 40. Fales sued Jones for breach of contract and got a judgment for $100. He told the sheriff to levy on and sell a horse that Jones had been using. The sheriff did so and Thayer bought the horse, which in reality belonged not to Jones, but to Murphy. As between Murphy and Thayer, who is entitled to the horse?

§ 43. In 1900 Allen, who had borrowed a mare from Gay some time before, told Gay that he intended to keep it for his own and if Gay did not like it he could sue. A statute provided that actions for the recovery of personal property or for the conversion of it must be brought within four years after the tort. Gay did nothing till 1906, when he found the mare tied in front of Al-

len's house and drove away with it and kept it. Allen now seeks to recover the mare from Gay. May he do so?

§ 44. Suppose that in the above case Allen had in 1903 sold the mare to Yoe and then Gay in 1906 had taken it from Yoe. Could Yoe regain it from Gay?

§ 45. Suppose Allen had himself kept the mare from 1900 to 1906; and that in 1904 she had a foal. Admitting Allen's right to the mare in 1906, who had the right to the foal, Allen or Gay?

§ 46. Morse wrote a letter to Finch, saying "That volume of Shakespeare in my library that you wanted is yours. Please come and get it." Before Finch could come Morse died. May Finch claim the volume as against Morse's executor?

§ 47. Holt gave Doane the key to his stable, saying, "I am going to make you a present of the horse and buggy in the stable. They are now yours." Is this enough to pass title?

§ 52. Has a livery stable keeper a lien at common law?

§ 56. Fogg called an expressman to move his furniture, the latter agreeing to do the job for $15.00. It took three trips to carry all the furniture. On the last trip the expressman delivered all but a sideboard, which he claimed to hold till the $15.00 was paid. Fogg tendered him $5.00, the charge for carrying the last load, claiming that he had lost his lien for the other two loads by delivering them. Is Fogg right?

§ 58. Suppose that in the above case the expressman had taken away the sideboard and stored it to preserve his lien. When Fogg came to pay, could the expressman have made him pay the storage charges as well?

§§ 60, 61. Dale hired a suite of furnished rooms at a hotel. After he had been there a while he had a number of rugs sent out to try. The hotel proprietor knew that they were sent out simply on approval. A day later Dale left, not paying his hotel bills. May the hotel keeper hold the rugs as against the owner to enforce his claim against Dale?

§ 62. Suppose that Dale had brought the rugs with him from another country and the hotel keeper had known that he had no right to them. Could the hotel keeper have enforced his lien against them?

§ 63. A thief stole a lot of diamonds and delivered them to an express company to carry out of the state. The express company acted in good faith. The owner discovered them and demanded

them from the express company and the latter claimed to hold them for charges. May it do so?

§ 65. A watchmaker who had repaired Hill's watch was holding it to enforce his charges. He wanted to raise some money, so he turned the watch over to Gould and told him to collect the repair charges from Hill and keep them. Hill now claims possession of the watch from Gould. May Gould enforce the lien against it?

§ 67. Lane was a wheelwright and had repaired Holt's wagon. He also had a claim against Holt for materials sold some time before. When Holt went to get his wagon, Lane said, "You can't have it until you settle up that old account as well." Holt made no tender, but brought replevin for the wagon. May Lane still enforce his lien for the repairs?

§ 68. Rice with his automobile stopped at a hotel for three weeks. He took his auto out every day or two for a trip. When he was about to leave, the hotel keeper tried to hold the auto for all unpaid charges to date. Rice claimed that he could hold the auto only for those charges accruing since it had last been out. Which was right?

§ 72. Stone pledged 100 shares of stock with Balch to secure a loan of $5,000 due July 1. On June 15th Balch, feeling certain that Stone would not redeem the stock, sold it to Doe. On July 1st Stone, without tendering the $5,000 to Balch or Doe, brought action against Balch for converting the stock. Has Balch a defense?

§ 74. Zane leased a reaper to Olsen for three weeks. Before the time was up Olsen took Zane's reaper apart and began to use the parts to repair some harvest machines of his own. What effect does this act have upon the legal possession of the reaper?

§ 75. Hicks loaned Evans a typewriter to use until Hicks should want it. If the typewriter is damaged, could Hicks' action be brought on the theory that the damage was a violation of his possession or only of his right to possession?

§ 78. Doe delivered goods to a railroad. At the end of the trip and while the railroad was holding them for its freight charges, the goods were wrongfully attached by the sheriff on an execution against Gray. The railroad let them go. Does this give Doe the possession, or only the right to possession?

§ 81. Gore found May's bicycle; took it home and left it outdoors so that it was badly rusted. Has May a right of action against Gore?

§ 82. Suppose May had come to claim the bicycle, but refused to identify himself or tell who he was, and Gore had refused to deliver it to him, would this make Gore liable?

§ 83. Ellis finds Ide's horse on the road, takes him in and keeps him for a month. May he hold him for the keep when claimed by Ide?

§ 84. Suppose Ide had advertised that he would "give a liberal reward and no questions asked." Could Ellis then hold the horse for $10.00?

Would it affect matters if in discussing the matter Ide had agreed that $10.00 was a fair reward?

Would it make any difference if Ide had advertised that he would give a reward of $10.00?

§ 85. Suppose in the above case that Jones had presented himself to Ellis, pretending to be Ide, the owner, and paid Ellis the $10.00, and had taken the horse and Ellis had shortly after discovered that he was not the owner, could Ellis recover the horse from Jones?

§ 86. A passenger in a Pullman car finds a watch. He turns it in at the Lost and Found Office of the Pullman Company. No one ever appears to claim it. Is the finder entitled to recover it from the Pullman Company?

§ 87. Green hired Dane to dig a well on Green's land. While Dane was digging he found a box of money buried eight feet under the soil, the former owner being unknown. To whom did it belong, Green or Dane?

§ 89. Suppose Dane had heard that there was money buried on Green's land and had come on it without Green's permission and had found the money. To whom would it belong?

APPENDIX B

PATENT LAW.

§ 13. Could a person who discovered a variation on the Darwinian law of the survival of the fittest patent his discovery?

§ 14. Would a larger handle on a screw driver, so as to give a better grip, be patentable?

Would lengthening the distance between the wheels of a bicycle so as to make it ride more easily be patentable?

§ 16. Can a combination of already known processes and materials ever give rise to a new patentable device?

§ 17. Must a device, in order to be patentable, be one in which the patentee has expended careful study as distinguished from a case where the idea occurred to him intuitively?

§ 18. Would a shoe with a broad, heavy sole be patentable as a device for tramping down the earth around posts?

Would it make any difference that the person seeking the patent had never seen persons doing that with ordinary shoes?

§ 19. Would an improved roulette wheel be patentable?

§ 23. Allen had the idea of a machine for washing windows, but it would work only on large panes; Bates suggested a change whereby it would work on both large and small panes. Should Allen and Bates apply for a patent as joint inventors or as separate inventors?

If an inventor assigns his invention before patenting, who should apply for the patent, and to whom should it be issued?

§ 27. What is the theory on which patent specifications are supposed to be drawn?

What is the effect if in patenting the device too broad a claim is made?

What is the effect if too narrow a claim is made?

§ 34. If the patent commissioner discovers that a patent has been issued to a subsequent inventor where it should have been issued to a prior inventor, may he cancel the patent so issued?

§ 38. For how long may a patent right be extended?

§ 39. Suppose an inventor has his invention almost perfected

and he learns that someone else is working on the same device, is there any way in which he may protect himself?

What are the disadvantages of this method of protection?

§ 42. Dale had a patent on an article. He thought it worthless and said to White, "Give me $10.00 and you may have all my rights in the patent." White did so. What was the nature of White's interest in the patent?

§ 45. Lord assigned his patent to Gray, Gray to pay 30 per cent of the net profits of the sale of the article. Gray then refused to manufacture or sell it. What redress has Lord?

§ 47. Lewis has a patent on a new kind of carriage wheel. A city ordinance forbids the use of wheels of less than a certain width. Lewis' patented wheel is less than the required width. If prosecuted under the ordinance, is his patent a defense?

§ 50. Hatch patented a device for stretching carpets while tacking them down, which had a curved handle to fit into the leg at the calf. Is a similar device with the handle curved to fit into the leg just above the knee an infringement?

§ 53. Morse improves a particular part of an already patented article and gets a patent on his improvement. May he treat others patenting other improvements upon the same part as infringers of his patent?

APPENDIX C

COPYRIGHT AND TRADEMARKS.

§ 1. A newspaper reporter wrote up a story which he finally decided not to turn in to his paper and kept in his desk. It was not copyrighted. Later another reporter got his copy and published it. Has the first reporter a right of action against the second reporter?

§ 2. Would it make any difference in the above case that the first reporter had definitely given up the idea of ever publishing the story?

§§ 6, 7. Which of the following may be copyrighted: a ledger, a perpetual calendar, a pattern for a woman's dress, a phonograph record, a kodak picture, a moving picture film, a musical comedy, a printed sticker labeled "Poison" to put on a bottle?

§§ 11, 12. Should the manuscript of the production desired to be copyrighted be sent for that purpose?

§ 14. What is the penalty for failing to send two copies of the production to be copyrighted to the Librarian of Congress?

§ 17. What is the greatest number of years for which a copyright may be held?

May a copyright be assigned?

Suppose it is assigned at different times to two persons, which one gets the right to it?

§ 19. Green wrote a story and copyrighted it. Fales then wrote a story and copyrighted it. Green claimed that Fales' story was a mere copy of his. Can the respective rights of the parties be settled by an examination of the records of the copyright office?

§ 22. What is the penalty for publicly performing any copyrighted play?

TRADE MARKS.

§ 28. Jones was a maker of crackers and for years had printed on his boxes a circular picture of a bake oven with the words "Jones' Best Biscuits" across it, and had built up a large trade for his goods. Another baker, much less well known, took in a partner by

the name of Jones and used a similar picture with the words "Jones' Best Biscuit." His goods were of inferior quality and the first Jones was seriously injured in his business. He had not registered his device as a trade mark. Has he any right of action against the imitators?

§ 31. Hill and May were partners manufacturing lead pencils. Hill one day sketched out a device that he said he thought would be good for a trade mark. They separated shortly after that and May at once began stamping the device on the pencils he made and using it as his trade mark and registered it as such. Is he entitled to it as against Hill?

§ 36. Does a person have to be a citizen of the United States in order to register a trade mark here?

§§ 37 to 46. Which of the following devices could not be registered as trade marks: "Square crossed over compasses," as a trade mark for carpenters' tools; "Imperial" as a trade mark for chewing gum, it already being used as a trade mark for a kind of cloth; or when the word "Royal" is already used as a trade mark for gum; "Jones, Smith & Co.," for certain goods manufactured by that firm; the same words, only printed in a circle with the pictures of Jones and Smith in the middle; "Jonbro" for a new article manufactured by John Brown; "Pittsburgh" for steel made in that city; "Cape Cod Turkey" for canned codfish; "Never-tair" for clothing.

§ 48. How long may a trade mark registration be retained?

§ 51. Luce, having a duly registered trade mark, sold the same to Finch, though he still continued in the same business. What are the rights of Finch with reference to the use of the trade mark?

§ 54. Hale had a duly registered trade mark on a certain kind of shoes. Todd was a small shoe manufacturer in Texas who sold no goods out of the state. He used the same device as Hale had registered. May Hale proceed against him for infringement of his trade mark?

§ 56. Suppose two different persons were allowed, through the error of the patent office, to register two very similar devices for the same kind of goods. What would be the rights of the two parties?

§ 58. In an action by Gay against Evans for the infringement of his trade mark he proved that Evans' gross sales while using the trade mark amounted to $100,000. No proof was given as to the cost of production. To what judgment for damages, if any, is Gay entitled?

§ 59. To what further relief may Gay be entitled?

APPENDIX D

RIGHTS IN LAND OF ANOTHER.

§ 4. Abbott and Blake are adjacent land owners. Blake hires Jones to excavate a cellar in Blake's land, leaving a strip a foot wide between the excavation and Abbott's boundary. Abbott's land nevertheless sinks in and is seriously damaged as a result of the excavation. Is Blake liable for the damage to Abbott's land?

Suppose that between the land of Blake and that of Abbott had been a piece of land belonging to Thomas. The three pieces were lying on the slope of a hill, with Abbott's at the top, Thomas' in the middle, and Blake's at the bottom, and the soil was so sandy that when Blake excavated in his piece the soil worked down from Thomas' land and so from Abbott's, thereby damaging Abbott's. Would Blake then be liable to Abbott?

§ 14. Gordon lived in the part of the town devoted to boiler making and machine shops. Smith came there and started a tin plate factory. Has Gordon a cause of action against him?

Would the case be different if Smith had opened a glue factory?

§ 17. Ballard had a large farm on the lower end of which was a ravine, through which the surface water and melting snow used to drain off in the spring over Cowen's land. Cowen built a dyke on his own land across the ravine, with the result that the water stood on Ballard's land for a long time in the spring and ruined his crops. Has he a cause of action against Cowen?

§§ 18, 19, 20. A landowner sinks a well on his own land and thereby gets water to supply his house. A neighbor, seeing that the water is very good, sinks a deeper well on his own land and puts in a powerful pump and pumps the water up, thereby causing the first man's well to become dry. He bottles the water and sells it in a neighboring city. Has the first landowner a cause of action against the second?

Would it make any difference if the second used the water in his own house?

Would it make any difference if he pumped it up and let it go to waste?

§ 21. Adams and Brown have farms through which runs Bubbly Brook, Adams being higher up on the brook. He puts in a windmill and pumps water from the brook to use in his house and water his stock. He uses so much that there is practically no water left in the brook when it reaches Brown. May Brown maintain an action against Adams?

Would the result be the same if Adams had used the water to supply a brewery which he put up on his land?

§ 26. What is the legal difference between the case where a landowner grants to a third person the right to excavate all the coal under the grantor's land and the case where he grants the third person the coal itself?

§ 30. Galt, the owner of a farm, granted to Peters, "his heirs, and assigns,"—Peters being the owner of an adjacent farm—the right to pasture 30 head of cattle on Galt's farm. Peters sold his farm to Thomas. Who, now, has the right to pasture the cattle on Galt's farm?

§ 32. Suppose, in the above case, that Peters had paid Galt $50 for the right and that Galt had written him a letter saying that he would give him a deed conveying the right, but had subsequently refused so to do. What would have been Peter's rights?

§ 35. In what ways may an easement be created?

§ 40. Graham had acquired by deed from Morton, the right to drain from his (Graham's) house through a ditch over Morton's land. He later discharged his stable drainage also through the same drain. Has Morton a cause of action?

§ 42. Suppose, in the above case, the drain had become stopped up on Morton's land. Would Graham have had a right to enter and clear it?

§ 43. Would it be a violation of Graham's rights in the last case for Morton also to discharge his drainage in the ditch?

§§ 46, 47. What is the difference in the legal rights of an abutter when he owns to the middle of the street subject to right of user by the public and when the city owns the street in fee simple?

§ 51. A railroad condemned a strip two hundred feet wide through Smith's farm for a right of way, fenced it, put a single track down the center. Smith claimed the right to cut the grass on either side of the track in the right of way. Is he entitled so to do?

§ 52. Barnes had a right of way over Clark's land to land of Barnes which lay across the road from Clark's land. Barnes used the way not only to go to the land across the road, but would also go

down the way to the highroad and then to town. Clark claimed that he had no right so to do. Is Clark's contention sound?

§ 55. Lane owned the lower story of a building and Townes the upper. Townes started to tear away the upper story. May Lane prevent him from so doing?

Suppose Townes let the upper story fall into disrepair, could Lane compel him to repair it?

§§ 69, 70. What is the distinction between a true easement and the so-called equitable easement?

§ 71. Allen sold the north half of his land, which had clay pits, to Bates, and agreed that no clay should be sold from the south half retained by him for the next ten years. The next year he sold the south half to Paine, who knew of this agreement with Bates. Paine began to sell clay from the land. May Bates enjoin him?

§ 74. Dodd sold Mead a lot in a residence district. Mead covenanted that he would not erect a flat building on it. Ten years later all that part of the city was devoted to shops and flat buildings and Mead began to build a flat. May Dodd enjoin him?

§ 77. What is the legal difference between a license and an easement?

§ 80. Gray sold Smith an auto which was at the time in Gray's garage and told Smith he could take it away any time in the next week. The next day he notified Smith to keep off his land. Smith went on Gray's land the same day and took the auto. Is he liable for trespass?

Suppose Gray had tried to keep Smith off and Smith had knocked him down and broken his arm. Would this have been justified if necessary to get the auto?

§ 83. Lord leased a house to Dale for ten years. Dale covenanted to keep it in repair. Two years later Dale assigned his lease to Wood. Wood did not keep the house in repair. May Lord hold Wood on the covenant?

§ 84. Could Lord have held Dale for Wood's failure to repair?

§ 88. Suppose in the lease last mentioned there had also been a covenant by Dale that he would not permit gambling in the house and Dale had subleased to Small for three years. If Small had permitted gambling, would Lord have had any remedy against him?

§ 89. What is the difference in the legal rights of a person to whom has been conveyed a piece of land which is protected by a covenant that runs with the land, and a person to whom a mere contract right has been assigned?

APPENDIX E

LANDLORD AND TENANT.

§ 2, 3. What are the various kinds of leases by express agreement and the chief differences between them?

§ 4. Nov. 1, 1908, Jones leased to Robinson a house for one year at a rent of $25 a month, payable in advance—Jones to heat the house. The year expired and on Nov. 1, 1909, Robinson paid Jones $25 as usual, which Jones accepted. Later in the month Jones notified Robinson to quit the premises and refused to heat them. Has Robinson a cause of action against Jones?

§ 5. Armstrong bought a reserved seat ticket for $12 for a series of six concerts. After the first concert the management tendered him back $10 and refused to let him occupy his seat thereafter. Has he a cause of action?

§ 7 Could Wright, a lodger, who had paid in advance for six weeks' lodging, maintain ejectment against the lodging house keeper for turning him out of his room during the six weeks?

§ 11. Murphy owned ten acres of land. He entered into a contract with Peterson whereby the latter was to have the exclusive control of planting and cultivating the land and attending to and harvesting the crop. Murphy was to supply the seed, horses and necessary harvesting machinery, and have one-half the crop. What was the legal relation between Murphy and Peterson?

§ 12. Hale executed the following instrument to Smith. "Hale hereby agrees to lease his ten acre tract (describing it) to Smith forever for $500 cash and to give him a good quitclaim deed to it and Smith agrees to pay the $500 therefor." What are the rights of the parties?

§ 13. What are the provisions of the Statute of Frauds with reference to leases?

§ 14. Is the following in the writing of John Peters a sufficient memorandum within the Statute of Frauds to bind him: "Rec'd Jan. 5, 1897, of L. Brown $75, rent three years from date of valley farm. J. P. "

§ 16. Gray made an oral lease to Lloyd for ten years at $10 a month. The Statute of Frauds required leases for more than three

years to be in writing. Lloyd entered under the oral lease. May Gray sue him as a trespasser?

§ 19. Jones wrote to Clark: "I will lease you my house at the corner of 1st avenue and Linden Street for three years at $300 a year upon the usual terms." Clark accepted. Jones then tendered him a lease containing the following covenants; that the lessee would keep the premises in repair; that he would not assign or sublease; that he would keep the premises insured in the name of the lessor; that the lessor should have a right to enter and inspect the premises; that the lessee should not use the premises for a lodging house. To which if any of the covenants may Clark properly object?

§ 20. If Jones refused to give any lease other than that above mentioned, what relief if any could Clark obtain?

§ 21. Lewis leased an office to Todd, a physician. The office was in such bad condition that it was impossible to use it as a physician's office and Todd refused to pay the rent. May Lewis recover the rent by an action at law?

Would it make any difference if the lease had stated that it was of "a physician's office" and had contained a covenant by Todd that he could use it for no other purpose?

§ 26. Crane leased a house to Murray for three years, covenanting that Murray should have quiet enjoyment. At the end of the first year Murray discovered that the land was really owned by Rogers and that Crane had no right to lease it. Does this constitute a breach of the covenant by Crane?

§ 28. Suppose in the last mentioned case that Murray assigned the lease to Guild and that Rogers then sued Guild in ejectment and that Guild defended the suit but finally lost and was forced to give up the house and pay $300 damages. Could Guild recover from Crane and if so how much?

§ 30. Curtis leased a three hundred acre farm to Hancock. Across the middle of it ran a public road. Curtis covenanted that the premises were free from incumbrances. Hancock later found there was a $100 mortgage on the premises, though it was not due until after his lease would expire. He sued Curtis alleging the road and the mortgage were each a breach of the covenant against incumbrances. Is his contention sound?

§ 31. Suppose Hancock had assigned his lease to Cabot. Could Cabot have sued Curtis on the covenant?

§ 32. Bates leased land to Cross and gave him the right to mine

coal for factory purposes. Does this clause prevent Cross from using the land for farm purposes?

Would the result have been different if the land had been expressly leased "for manufacturing?"

§ 34. What are the rules laid down by Spencer's case as to the running of covenants in leases?

§ 36. May the lessee assign or sublet without the consent of the lessor?

§ 37. May the lessor assign his interest without the consent of the lessee?

§ 38. Lamb had a lease that still had twenty years to run. He executed to Smith the following instrument: "I hereby assign to Smith all right, title, and interest in the aforesaid lease for a term of fifteen years from date." Is this an assignment or sublease?

§ 39. Lowrey leased a store to Murphy with a covenant that the lease should not be assigned without the consent of the lessor. Murphy went into bankruptcy and his trustee in bankruptcy took over the lease and sold it as an asset of the estate. Is this a breach of the covenant?

§ 40. Assuming the lease to have been assigned by Murphy in such a way as to amount to a breach of the covenant, could Lowrey have then entered and terminated the lease?

§ 42. Suppose a lessee assigns his lease with the consent of the lessor and the assignee does not pay the rent. May the lessor hold the original lessee for it?

§ 43. Suppose the first assignee in turn assigns with the consent of the lessor to a second assignee and the latter does not pay his rent. May the lessor hold the first assignee therefor?

§ 44. Larson leased two buildings to Tenney for twenty years with a proviso in the lease that if the premises were not kept insured, the lessor might enter and forfeit the lease: Tenney subleased one building to Squires for fifteen years with the same covenant. Squires kept his building insured but Tenney did not keep his insured. May Larson oust Squires as well as Tenney?

§ 48. A lessee of a farm on which there are twenty acres of woodland cuts down the wood and sells it. Has the lessor a right of action against him?

Would the lessor have a right of action if the tenant cut wood to burn in the house or to make fence rails?

§ 50. Aldrich leased a farm to Morse. The floor of the barn was in very bad condition and Aldrich knew it. Morse did not. The first

day on the farm Abner, Morse's hired man, drove into the barn and the floor fell with him seriously injuring him. Who is responsible therefor?

§ 52. Suppose the floor had been all right when the lease was made but subsequently Aldrich had found that it had become decayed and had not told Morse and the latter was injured by falling through. Could Morse hold Aldrich?

§ 54. Suppose in the last case that Morse had notified Aldrich that the floor needed repairing and requested him to repair it and Aldrich had refused and then Morse had been injured. Would Aldrich be liable?

§ 57. May 1. Galt leased a flat to Carter for one year at $50 a month. During the summer while Carter was away Galt put in a built-in side-board and a new ice-box and calcimined and papered the flat; so that it was then admittedly worth $55 a month. While so doing he damaged Carter's furniture to the extent of $20. Galt now attempts to hold Carter for $55 a month. Carter sues him for the $20. What judgment should be given?

§ 63. Suppose in the above case that the alterations had been made by Carter. Could he have collected from Galt the value of these improvements?

§ 69. What are the various kinds of rent known to the common law?

§ 71 Little leased to Brown for three years at a rent of $75 a month. Brown subleased the same premises to White at $100 a month. Brown does not pay Little. May the latter hold White for the $75 a month?

§ 74. Jones leased a hundred acre farm to Smith at $100 a month. Jones then sold all his interest in seventy-five acres to Gray. What is the liability of Smith to Jones and Gray respectively?

§ 76. Suppose in the last case that the assignment was made on the 27th of the month and the rent was due on the 30th. Who would be entitled to the rent for that month?

§ 79. Raymond was holding under a lease from Beal a farm consisting of one hundred acres of land, three barns and a house. Beal used one of the barns to store his own hay and machines in but offered to abate the rent. Raymond thereupon notified him that he would pay no further rent and also refused to give up the premises What action, if any, has Beal?

§ 83 A lease did not state where the rent was to be paid. Must the lessee go to the lessor or the lessor come to the lessee?

§ 85. What are the various ways by which a landlord may collect his rent?

§§ 86-90. What is the method of levying a distress and upon what may it be levied?

§ 92. A lease contained a clause that the lessor should have a lien for his rent upon all the goods of the lessee. Subsequently certain goods of the lessee were seized on execution by a creditor. The landlord claimed to hold them for his rent. Which one is entitled thereto?

§ 99. What is meant by the word "Fixture?"

§ 102. Gray owned a factory in which there was a great deal of machinery and belting some of which was actually on the wheels and other pieces of belting were lying over the shafts but not in use. He gave a deed of the factory to Finch. May Gray thereafter remove the loose belting?

§ 106. The lessee of a farm added several improvements to the barns. At the end of his lease he sought to remove them. May he do so if he leaves the barns in the same condition as when he took them?

§ 110. Is a lessee for a definite term entitled to a notice to quit?

§ 112. To how long a notice to quit is a tenant at will entitled?

§ 114. Abbott leased a factory to Jones. It was totally destroyed by fire. Did this terminate the lease?

§ 116 A lease provided that it should be forfeited if the tenant failed to keep the premises insured. He failed to do so. On an attempt by the landlord to collect rent accruing later, may the tenant claim that the lease is ended?

APPENDIX F

FORM OF LEASE.

THIS INDENTURE, Made the ..... day of ....., in the year One Thousand Nine Hundred and ....., between A. B., of ....., in the County of ....., and State of ....., of the first part, and Y. Z., of ....., in the said county, of the second part,

WITNESSETH That the party of the first part has hereby let and rented to the party of the second part, and the party of the second part has hereby hired and taken from the party of the first part [*here insert brief description of the premises—e. g., thus:*] the frame dwelling house and premises known as No. 9 King street, in the City of ....., with the appurtenances, for the term of ..... years, to commence the ..... day of ....., 19...., at the yearly rent of ..... Dollars, payable in equal monthly payments of ..... Dollars, on the first day of each month during said term.

And the party of the second part hereby covenants to and with the party of the first part to make punctual payment of the rent, in the manner aforesaid, and quit and surrender the premises at the expiration of said term, or other determination of this lease, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted; and further covenants that he, the party of the second part, will not use or occupy said premises for any business or purpose deemed extra-hazardous on account of fire; and that he will pay all water rent and gas bills charged on said premises during the term of this lease.

And the said party of the second part further covenants that he will permit the said party of the first part, or his agent, to enter said premises for the purpose of making repairs or alterations, and also to show the premises to persons wishing to hire or purchase; and on and after the ..... day of ....., 19...., will permit the usual notice of "to let," or "for sale" to be placed upon the walls of said premises, and remain thereon, without hindrance or molestation; and also, that if the said premises, or any part there-

of, shall become vacant during the said term, the said party of the first part may re-enter the same, by either force or otherwise, without being liable to any prosecution therefor, and re-let the said premises as the agent of the said party of the second part, and receive the rent thereof, applying the same first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due by these presents, and the balance, if any, to be paid over to the said party of the second part.

And the said party of the second part further covenants, that he will not assign this lease or underlet the said premises, or any part thereof, to any person or persons whomsoever, without first obtaining the written consent of said party of the first part; and in case of not complying with this covenant, the party of the second part agrees to forfeit and pay to the party of the first part the sum of ..... Dollars, as and for liquidated damages, which are hereby liquidated and fixed as damages and not as a penalty.

This lease is made and accepted on this express condition, that in case the party of the second part should assign this lease, or underlet the said premises, or any part thereof, without the written consent of the party of the first part, then the party of the first part, his heirs or assigns, in his or their option, shall have the power and the right of terminating and ending this lease immediately, and be entitled to the immediate possession of said premises, and to take summary proceedings against the party of the second part, or any person or persons in possession as tenant, having had due and legal notice to quit and surrender the premises, holding over their term.

And it is further agreed, that in case the building on said premises shall, without any fault or neglect on his part, be destroyed, or be so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, the tenant shall not be liable or bound to pay rent to the lessor or owner thereof for the time after such destruction or injury, and may thereupon quit and surrender possession of the premises.

In Witness Whereof, The parties hereto have hereunto interchangeably set their hands and seals, this ..... day of ....., one thousand, nine hundred and .....

.....

[*Signatures and Seals.*]

Signed, sealed and delivered in the presence of

[*Signature of Witness.*]